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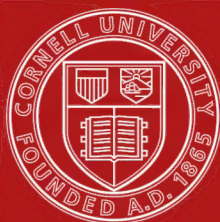
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A practical treatise on the law of nuisa



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A PRACTICAL TREATISE

ON

THE LAW OF NUISANCES

IN THEIR

VARIOUS FORMS;

INCLUDING

REMEDIES THEREFOR AT LAW AND IN EQUITY.

By H. G. WOOD,
ATTORNEY AND COUNSELOR AT LAW.

ALBANY, N. Y.
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PREFACE.

I can assure the profession that it is with no small degree of trepidation that I submit this work to their criticism. But, whatever may be the reception with which it meets at their hands, I have the consciousness that I have labored earnestly, faithfully and honestly to make it a work worthy their patronage and favor. That it is not free from faults, I am fully aware, but it must be remembered that I was a pioneer in this "wilderness" of law, with no compass to guide me, but left to find my way through the entangled mass, as best I might. No work upon the subject has previously been written, and, while there are numerous works in which a single chapter is devoted to the subject, yet, in every instance, I have found those chapters worse than useless, as affording any light upon the subject. They are necessarily superficial views of the subject, and calculated to mislead, rather than to serve as a guide.

I have examined most of the decided cases bearing upon the various branches of the subject in the reports of the courts, both of this country and England, that were within my reach. I believe that none of any importance have escaped my attention. If so, it has been through inadvertence, and not design.

That the work may be found useful, both to the student and practicing lawyer, is my earnest wish, and, if I have failed to grasp the subject with that vigor, or to set it forth with the

clearness desirable, I have the satisfaction of knowing that I have at least cleared the way for some abler and more vigorous writer, who may hereafter take up the subject.

ALBANY, N. Y., *April* 12, 1875.

H. G. WOOD.

NOTE. — Since this work went to press, the Supreme Court of Illinois, in the case of *Stone v. The F. P. & N. W. R. R. Co.* (Am. Law Times, vol. 2, p. 54), have held that a railroad company which, in the operation of its road, casts smoke, dust or cinders over or upon the estate of one whose lands have not been taken for the construction of its road, is liable for all damages resulting therefrom, whether to the property itself or its comfortable enjoyment. This doctrine conflicts with *Brand v. Hammersmith R. R. Co.*, 4 H. L. Cas. 451, but it is sustained by substantial justice, and rests upon sound principles. See, also, *Eaton v. Boston, Concord & Maine R. R. Co.*, 51 N. H. 504, where, in effect, a similar doctrine is held.

H. G. W.

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NUISANCES.

CHAPTER FIRST.

NUISANCES DEFINED AND CLASSIFIED.

SEC. 1. Nuisances defined.

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3. Diminution of the value of property not enough; injury must be tangible, or such as impairs its enjoyment.
4. Act must not only violate another's right, but, generally, must affect them prejudicially.
5. When a right is violated, the law presumes damage. *Ashby v. White*; *Barker v. Green*; *Strong v. Campbell*.
6. The motives of a party have no bearing in determining the question of nuisance. *Tipping v. St. Helen Smelting Co.*; *Huckenstine's Appeal*; *Toyhale's Case*; *Rex v. White*; *Attorney-General v. Steward*.
7. Fanciful notions not regarded; injury must be to a substantial right. *Pickard v. Collins*; *Mahan v. Brown*.
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10. Rule in *Tipping v. St. Helen Smelting Co.*; *Ross v. Butler*.
11. Nuisances arise from violation of common-law rights. *Bulbrooke v. Goodere*.
12. Statutory provisions as to nuisances do not take away common-law remedy, unless so provided. *Renwick v. Morris*.
13. Nuisances most commonly arise from misuse of real property.
14. Nuisances are public, private and mixed. Public nuisance defined.
15. Private nuisance defined.
16. Mixed nuisance defined.

SECTION 1. A nuisance, in the ordinary sense in which the word is used, is any thing that produces an annoyance, any thing that disturbs one or is offensive; but in legal phraseology it is applied to that class of wrongs that arise from the unreasonable, unwarrantable or unlawful¹ use by a person of his own property, real

¹ Smith's Manual of Common Law, 7; 9 Barb. (N. Y. Sup. Ct.) 350; *Plant v. Hilliard* on Torts, 680; 4 Jacob's Law Long Island Railroad Co., 10 id. 26. Dictionary, 414; *Harris v. Thompson*,

or personal,¹ or from his own improper, indecent or unlawful personal conduct,² working an obstruction of or injury to a right of another or of the public, and producing such material³ annoyance, inconvenience, discomfort or hurt, that the law will presume a consequent damage.⁴ Indeed it may be stated, as a general proposition, that every enjoyment by one of his own property, which violates the rights of another in an essential degree, is a nuisance, and actionable as such at the suit of the party injured thereby. While it is true that every person has and may exercise exclusive dominion over his own property of every description, and has a right to enjoy it in all the ways and for all the purposes in which such property is usually enjoyed,⁵ yet, this is subject to the qualification that his use and enjoyment of it must be reasonable, and such as will not prejudicially affect the rights of others. It is a part of the great social compact to which every person is a party, a fundamental and essential principle in every civilized community, that every person yields a portion of his right of absolute dominion and use of his own property, in recognition of, and obedience to the rights of others, so that others may also enjoy their property without unreasonable hurt or hindrance.⁶ This is an essential rule, a wise provision of the law, and one that is for the mutual protection and benefit of every member of society.

¹ *Michael v. Alestree*, 2 Lev. 172; *Dixon v. Bell*, 1 Starkie, 287; 2 Starkie's Ev. 532; *Jones v. Perry*, 2 Esp. 482. A use of property, that at common law is held to be a nuisance, does not cease to be so because the same act is made an offense by statute and a different punishment provided; the party creating the nuisance may be pursued under either the common-law or statutory remedy. *Wetmore v. Tracey*, 14 Wend. (N. Y.) 250; *Renwick v. Morris*, 7 Hill (N. Y. Sup. Ct.), 575; *People v. Sands*, 1 Johns. (N. Y.) 78.

² *Regina v. Gray*, 4 Fost. & Fin. 73; *State v. Jones*, 9 Ired. (N. C.) 174; *Nolin v. Mayor, etc.*, 4 Yerg. (Tenn.) 163; *Dixon's Case*, 3 M. & S. 11; *Booth v. Wilson*, 1 B. & A. 59; *State v. Taylor*, 29 Ind. 517; *Commonwealth v. Temple*, 8 Am. Law. Reg. (Mass.); *Rex v. Smith*, 2 Stra. 704. Nuisances always arise from unlawful acts. That which is lawful can never be a nuisance. Therefore, where the legislature, by

an act that it is competent for it to enact, authorizes an act to be done, which would otherwise be a nuisance, the act is made lawful and is not a nuisance, unless the power given by the legislature is exceeded. *Leigh v. Westervelt*, 2 Duer (N. Y. Sup. Ct.), 618; *Williams v. Railroad Co.*, 18 Barb. (N. Y. Sup. Ct.) 222; *Renwick v. Morris*, 7 Hill (N. Y.), 575.

³ *Smith's Manual of Common Law*, 8; *Addison on Torts*, 74; 2 Selwyn's N. P. 1129; *Crump v. Lambert*, L. R. 3 Eq. Cas. 409; *Tipping v. St. Helen Smelting Co.*, 4 B. & S. 608; *Cavey v. Ledbitter*, 13 C. B. 470.

⁴ *Ashby v. White*, 2 Ld. Raym. 938; *Lansing v. Smith*, 8 Cow. (N. Y.) 152; *Butler v. Kent*, 19 Johns. (N. Y.) 223; *Coke's Inst.* 56a; *Robert Mary's Case*, 9 Coke, 112.

⁵ *Radcliffe's Executors v. Brooklyn*, 4 N. Y. 195.

⁶ *Barnes v. Hathorn*, 7 Am. Law Reg. 811; 54 Me. 124.

SEC. 2. It is not every use of one's property that works an injury to the property of another that creates a nuisance. Injury and damage are essential elements of a nuisance, but they may both exist as the result of an act or thing, and yet the act or thing producing them not be a nuisance; for, as has been before stated, every person has a right to the reasonable enjoyment of his property, and so long as the use to which he devotes it violates no rights of another, however much damage others may sustain therefrom, his use is lawful, and it is "*damnum absque injuria*."¹

As to what is a reasonable use of one's property must necessarily depend upon the circumstances of each case, for a use for a particular purpose and in a particular way, in one locality that would be lawful and reasonable, might be unlawful and a nuisance in another.²

A slaughter-house may be erected so far away from a city or town, or from dwelling-houses, as to produce no offensive results, and the business of slaughtering cattle may be lawfully carried on there, even though by reason thereof the lands in the vicinity are rendered less saleable, and in that respect less valuable; in fact, even though the owners should be unable to sell them at all by reason of the existence of the slaughter-house. But, when the city or town extends so far in that direction, or the lands in the vicinity are occupied for dwellings, so that the business becomes so offensive as to interfere with the reasonable enjoyment of the surround-

¹ In *Thurston v. Hancock*, 12 Mass. 220, the plaintiff erected a valuable residence upon Beacon street, in the city of Boston, on a lot adjoining the defendant's. He took the precaution to lay his foundation wall sixteen feet below the surface. After his building was completed, the defendant entered upon his lot and made an excavation thirty-two feet deep, cracking the foundation walls of the plaintiff's house, and rendering them so insecure that he was compelled to take his house down. The court held that there could be no recovery. So in *La Sala v. Holbrook*, 4 Paige's Ch. (N. Y.) 169, the plaintiffs had erected a large and costly church upon a lot in New York city adjoining the defendant's, and the defendant, to lay the foundation walls of a new build-

ing that he was about to erect, began to excavate to the depth of several feet below the walls of the church, which endangered the safety of the church. On hearing, the court dissolved the injunction, on the ground that the defendant had a right to make the excavation, and the plaintiffs had no redress.

² *Weeks v. Brady*, 3 Barb. 157; *Peck v. Elder*, 3 Sandf. (N. Y.) 126; *Walter v. Selve*, 4 Eng. L. Eq. 20; *Bamford v. Turnley*, 3 B. & S. 62; *Tipping v. St. Helen Smelting Co.*, 4 id. 608; *Barnes v. Hathorn*, 7 Am. Law Reg. 84; 54 Me. 124; *Addison on Torts*, 74; *Dargan v. Waddell*, 9 Ired. 244; *Rhodes v. Dunbar*, 7 P. F. Smith (Penn. St.), 84; 58 Penn. 184; *Weir v. Kirk*, 1 Am. Law Times, 88.

ing premises, for the purposes of habitation or other purposes, the business becomes unlawful and a nuisance, and must yield to the superior rights of others, even though the loss thus entailed upon the owner is ruinous.¹

In *Brady v. Weeks*, 3 Barb. (N. Y. S. C.) 159, which was an action to restrain the continuance of a slaughter-house in a certain locality, PAIGE, J., in delivering the opinion of the court, said: "When the slaughter-house was erected, it incommoded no one; but now it interferes with the enjoyment of life and property, and tends to deprive the plaintiffs of the use and benefit of their dwellings. As the city extends, such nuisances should be removed to the vacant ground beyond the immediate neighborhood of the residences of the citizens. This, public policy, as well as the health and comfort of the population of the city, demands."

SEC. 3. In order to create a nuisance from the use of property, the use must be such as to work a tangible injury to the person or property of another, or as renders the enjoyment of property essentially uncomfortable. It is not enough that it diminishes the value of surrounding property. It is not enough that it renders other property less saleable, or that it prevents one from letting his premises for as large a rent as before, or to as responsible or respectable tenants. It must be such a use as produces a tangible or appreciable injury to the property, or as renders its enjoyment essentially uncomfortable or inconvenient.²

Thus, a business that, by reason of the fumes or vapors that arise from it, produces a visibly injurious effect upon vegetation by preventing its growth, or seriously injuring or destroying it, or that produces a visible damage to buildings or other property, may be a nuisance even though it does not render the enjoyment of life less comfortable, or produce any ill effects to the occupants of

¹ *Rhodes v. Dunbar*, 7 P. F. Smith (Penn. St.), 275; *Brady v. Weeks*, 3 Barb. 159; *Catlin v. Valentine*, 9 Paige's Ch. (N. Y.) 575; *Weir v. Kirk*, 1 Am. Law Times, 38.

² *Ryan v. Copes*, 11 Rich. L. 217. It was held that the effect must be such that the property cannot be enjoyed as fully and amply as before, or as renders them unfit for habitation by in-

creased danger, or as substantially impairs their value. In *Tipping v. St. Helen Smelting Co.*, 11 Jur. 785, the court says: "In an action for an injury to property from noxious vapors arising upon the lands of another, the injury must be such as visibly to diminish its value, comfort and enjoyment." *Lansing v. Smith*, 8 Cow. (N. Y.) 153.

surrounding premises.¹ So, too, a use of premises that, by reason of its peculiar results, renders the enjoyment of life uncomfortable, is a nuisance, although it produces no visibly injurious effect upon property of any kind: Such as noise, so continuous and excessive as to produce serious annoyance,² or vapors, or noxious smells that render the enjoyment of life uncomfortable,³ or that by reason of its extremely hazardous character creates a reasonable apprehension of injury therefrom, either to the lives or property of those in its vicinity—such as powder mills or magazines in a town or city, or near dwellings or public roads.⁴

SEC. 4. Not only must a right be violated, but in order to constitute a nuisance the violation of the right must work material inconvenience, annoyance, discomfort, injury and damage.⁵

It is not necessary that all these elements should concur as the results of an act in order to constitute a nuisance, but it is essen-

¹ *Tipping v. St. Helen Smelting Co.*, 11 Jur. 785; also 116 Eng. Com. Law, 608. In *Lilly's Register*, vol. 2, p. 309, it is said: "Case lies for melting lead so near to the plaintiff's close that it spoiled his grass and wood there growing, though this was a lawful trade and for the benefit of the nation;" and he cites *Jones v. Powell*, Hutt, 136, and *Palmer*, 536. In *Huckenstine's Appeal*, 70 Penn. St. 102, the point was raised, but the facts not showing that the injury to vegetation resulted from the vapors, the question was not directly decided. *Bankhart v. Houghton*, 27 Beav. 327.

² *Brill v. Flagler*, 23 Wend. (N. Y.) 354; *Elliott v. Feetham*, 2 Bing. (N. C.) 134; *Street v. Tugwell*, 2 Selw. 299; *Carrington v. Taylor*, 11 East, 571; *Keeble v. Heckeringill*, id. 371; *Rex v. Smith*, 1 Stra. 704; *Fish v. Dodge*, 4 Denio, 311; *Dennis v. Eckhart*, Am. Law Reg. 166; *Allen v. Lloyd*, 4 Esp. 200.

³ *Catlin v. Valentine*, 9 Paige, 575; *Walter v. Selfe*, 4 Eng. L. Eq. 20.

⁴ *Weir v. Kirk*, 1 Am. Law Times, 38; *Anonymous*, 12 Mod. 342; *Rhodes v. Dunbar*, 58 Penn. St. 275; *Cheatham v. Shearon*, 1 Swan. (Tenn.) 213; *Rex v. Taylor*, 2 Stra. 1167; *Williams v. Camp*, 3 East, 192; *Myers v. Malcolm*, 6 Hill (N. Y.), 292.

⁵ In *Sparhawk v. Union Railroad Co.*,

54 Penn. St. 401, it was said: "That in order to make out a case of special injury to property by a nuisance, something materially affecting its capacity for ordinary use and enjoyment must be shown." In *Casebeer v. Mowry*, 55 Penn. St. 419, it was held, that "a man may not with impunity invade another's premises with any thing in the shape of a nuisance, simply because the damages are not appreciable, for the law will presume damages, if there is a clear violation of the plaintiff's rights, as evidence of the right." In *McKeon v. Lee*, 4 Rob. (N. Y.) 449, it was held, that attaching steam-power in a building, that causes such a vibration and jarring to adjoining premises as to materially affect their value for rent, is a nuisance, however lawful or useful the business to which the power is devoted. In *Begein v. Anderson*, 28 Ind. 79, it was held, that the mere allegation that a certain thing exists in a locality and is a nuisance—as in this case, a cemetery—is not sufficient, but that facts must be alleged, showing that it materially violates the rights of individuals or the public. In *Chatfield v. Wilson*, 28 Vt. 49, it was held, that the law only gives damages for injuries to legal rights, and that in order to recover for an injury the party must establish the violation of a legal right by the party sought to be charged.

tial that some one of those results should ensue, and that the act or thing producing them should be in violation of the rights of another or of the public, and that the violation of the right should prejudicially affect another. "A nuisance," says Smith in his *Manual of the Common Law*, "is something done which has the effect of prejudicially and unwarrantably affecting the enjoyment of the rights of another person." If he had also added, or something *omitted* to be done, his definition would have been sufficiently comprehensive to cover the subject, and would be complete, for a nuisance may arise from an omission to do an act which one's duty to others requires him to perform, as well as from the doing of a positive act. As, if one suffers his buildings to remain in a dilapidated condition, whereby the property of another is endangered, it is a nuisance as to the person whose property is so endangered, and may be abated as such by the adjoining owner.¹

So, too, if one allows his buildings to remain in an unsafe condition upon a public street, so that they endanger the safety of people lawfully passing along the same, they are a common nuisance, and the person whose duty it is to make the repairs is indictable for allowing them to remain in that condition, or is liable at the suit of a private party for all injuries sustained therefrom.²

¹ In *Treadwell v. Davis*, 39 Ga. 84, it was held, that neglect by the owner to keep any thing in repair, which from want of repair is *per se* a nuisance, makes the party liable for a nuisance. In *Booth v. Wilson*, 1 B. & A. 59, it was held, that leaving a fence out of repair, which one is bound to repair, is a nuisance, and makes the person who is bound to repair liable to those sustaining damage thereby. See *Tenant v. Goldwin*, 3 Ld. Raym. 1093, where it was held, that "if one have a house near the house of another, and he suffers his house to be so ruinous as to be likely to fall upon the house of the other, it is a nuisance." In *Anonymous*, 11 Mod. 8, it is said: "If a man build a new house under the roof of an old one that is ready to fall down, he shall have a writ to prostrate the old house." Lord Holt said: "Every man of his own right ought to support his own

house, so that it may not be an annoyance to his neighbors."

² In *State v. Purse*, 4 McCord (S. C.), 472, it was held, that a house, which for the purpose for which it was used, or the situation in which it is placed, may not be a nuisance, may become so by negligence in keeping it, and that when this is the ground of the prosecution, it must be so alleged in the indictment. So, too, the neglect to repair a bridge or highway renders the persons or corporation, whose duty it is to make the repairs, liable to indictment as for a nuisance. *Bacon's Abr.*, vol. 7, p. 232, tit. Nui., B; *Shepley v. Fifty Associates*, 101 Mass. 251. So permitting the walls of a burned building to stand on public street in dangerous condition. *Church of the Ascension v. Buckhout*, 8 Hill (N. Y.), 193. So permitting a house to remain in a ruinous condition near a highway. 1 Stra. 357.

SEC. 5. Injury and damage must concur as results of an act or thing in order to make it a nuisance;¹ but where there is a material injury, damage is always implied when it results from the violation of a right.²

In *Ashby v. White*, Lord HALL, in delivering a dissenting opinion, said: "Every injury to a right imports a damage in the nature of it, though there be no pecuniary loss."

In 1 Smith's Leading Cases, 364, the learned annotators say: "The mode of determining whether damage has been done by what the law esteems an injury, is to consider whether any right existing in the party damnified has been infringed upon; for if the party have no right in the matter, the fact that he is injured will not help him."

In *Barker v. Green*, 2 Bing. (N. C.) 317, the court says: "Where a right exists in the parties damnified, the infringement thereof is an injury; and if an injury be shown, the law will presume some damage." But the right must be clear, unequivocal and vested.³ Thus in *Strong v. Campbell*, 11 Barb. (N. Y. S. C.) 138, which was an action against the defendant who was a postmaster, whose duty it was by statute to advertise letters in newspapers of a certain class, it was held, that this being a matter intended to benefit the receivers of letters, and not the publisher of the paper, though they might derive some incidental and contingent benefit therefrom, yet, that they had no such vested right in the matter, that they could maintain an action against the postmaster for not selecting their paper as within the class. The court said: "While it is the duty of every officer to perform the duties imposed upon him by

¹ *Campbell v. Scott*, 11 Sim. 39; *Scott v. Firth*, 4 Fost. & Fin. 349. In *Anonymous*, 1 Mod. 55, it was said, that to maintain an action for a nuisance, there must be some damage proved, for an act occasioning inconvenience merely is not actionable. *Lansing v. Smith*, 8 Cow. (N. Y.) 162.

² There are a class of injuries to incorporeal hereditaments where the court will presume damage, even though none exists in fact. Thus in *Fry v. Prentice*, 14 L. J. (N. S.) 298, which was an action to recover damage for building a house so that the eaves projected over the plaintiff's land, the court held that this was a

nuisance and an infringement of the plaintiff's rights, and that although it was not proved that any rain had fallen whereby the plaintiff had been injured, yet the court would take judicial notice of the fact that rain falls, and after the lapse of a reasonable time will presume that there has been rain unless the contrary is proved, and therefore will presume damage.

³ Lord HOLT's opinion in *Ashby v. White*, 2 Ld. Raym. 938; *Martin v. Brooklyn*, 1 Hill (N. Y.), 545; *Bank of Rome v. Mott*, 17 Wend. (N. Y.) 556; *Foster v. McKibben*, Am. Law J. (N. S.) vol. 1, p. 411; 19 Viner's Abr. 518-520; *Pantam v. Isham*, 1 Salk. 19.

law, it does not follow that for every violation of his duties someone can recover private damages." Injury and damage are the very gist of a nuisance,¹ and, except in cases of that class of acts or things that have been declared by the courts to be nuisances *per se*, the very first inquiry should be, whether injury and damage have resulted from the act or thing, or are reasonably likely to result therefrom to the individual complaining, for in their absence no right can be said to be violated, and, consequently, no nuisance exists.²

SEC. 6. Nuisances arising out of the use to which property is devoted, either by the owner or one who is lawfully in possession, are declared so by the courts with extreme caution;³ for upon the very threshold of inquiry they are met by conflicting rights of the parties, and in nearly every instance with a use of the property which is lawful in itself, and in its use in the manner complained of is attended with no wrongful intent or improper purpose. It is merely a question of rights.⁴ The motives of the

¹ In the case of the *Farmers of Hempstead*, 12 Mod. 519, HOLT, J., said: "The gist of the action of nuisance is damage, and so long as there are damages, there are grounds for an action." In *Thayer v. Brooks*, 17 Ohio, 489, it was held, that the rule of damages in an action for a nuisance was the damage actually sustained, and that no recovery could be had for the prospective or permanent injury to the realty. *Cleveland v. Gas Co.*, 20 N. J. 209. In *Scott v. Firth*, 4 Fost. & Fin. 349, it was held, that "to constitute a nuisance there must be real and sensible damages, having regard to the situation and use of the property injured." The same rule was adopted in *Pinckney v. Ewens*, 4 L. T. (N. S.) 741, where the court said that it was a question for the jury to say whether damage had been proved. In *Tipping v. St. Helen Smelting Co.*, 11 Jur. (N. S.) 785, referred to *infra*, the same doctrine was held, also, as to the materiality of showing actual damage. See *Bamford v. Turnley*, 3 B. & S. 66; *Stockport Water Works v. Porter*, 7 Hurlst. & N. 160; *Pinckney v. Ewens*, 4 L. T. (N. S.) 741.

² As to apprehended danger, see *People v. Sands*, 1 Johns. 78; *Cheatham*

v. Shearon, 1 Swan. (Tenn.) 213; *State v. Purse*, 4 McCord, 472; *Meeker v. Van Rensselaer*, 15 Wend. (N. Y.) 377; *Wolcott v. Mellick*, 3 Stockt. (N. J.) 208.

³ In *Tipping v. St. Helen Smelting Co.*, 11 Jur. (N. S.) 785, it was said by the court: "Where great works are carried on, which are the means of developing the national wealth, persons must not stand on extreme rights, and bring actions for every petty annoyance."

⁴ In *Attorney-General v. Sheffield Gas Co.*, 19 Eng. L. Eq. 644-646, the court says: "The question for the court to determine is, whether the effect of the act (claimed to be a nuisance) is such as the party has no right to produce." In *Holsman v. Boiling Spring Co.*, 1 McCarter (N. J.), 335, it was held, that "no one has a right to pollute or corrupt the water of a stream, or, if they are already polluted, to render them more so, because all whose lands border on a stream have a right to have its waters come to them pure and unpolluted;" and thus, while the court will not balance conveniences, it must balance and measure rights in determining what is a nuisance.

parties have no connection with the inquiry, or bearing upon the result. An act, however malicious, however wrongful in its intent, or however serious in its consequences, may be so far within the scope of the party's right as not to be a nuisance or produce an actionable injury;¹ while upon the other hand, a party who devotes his premises to a use that is strictly lawful in itself, that is fruitful of great benefits to the community, that adds materially to its wealth, and enhances its commercial importance and prosperity, and whose motives are good, and intentions laudable even, may find that by reason of the violation of the rights of those in the vicinity of his works, from results that are incident to his business, and that cannot be so far corrected as to prevent the injury complained of, his works are declared a nuisance, his business stopped, and himself involved in financial ruin. Therefore, it is proper and highly important that courts should proceed with extreme caution, and weigh the relative rights of parties with exceeding care, and never declare a business a nuisance, except there be such essential injury and damage that the act or thing cannot be justly tolerated without doing great violence to the rights of individuals and the public. People living in cities and large towns must submit to some inconvenience, to some annoyance, to some discomforts, to some injury and damage; must even yield a portion of their rights to the necessities of business, which, from the very nature of things, must often be carried on in populous localities and in compact communities, where facilities alone exist upon which it can be kept up and prosecuted.

¹ In *Chatfield v. Wilson*, 28 Vt. 49, the court says, that the *motives* with which the act is done can have no bearing upon the question; that the maxim "*sic utere*," etc., applies only to legal rights and injuries. Also, see *Ashby v. White*, 1 Smith's Lead. Cas. 342, and notes thereto; also, *Radcliffe's Executors v. Brooklyn*, 4 N. Y. 195; *Pickard v. Collins*, 28 Barb. (N. Y. Sup. Ct.) 444; *Ellis v. Duncan*, 21 id. 230. In *Scott v. Shepard*, 2 W. Black. 894, it was held that an action would lie sometimes for the consequences of a lawful act; that the motive with which an act was done was not the test of liability. In *Lambert v. Bessey*, Ld. Raym. 423, it was held, that if a man assault another, and the person assaulted lift up his

cane to ward off the blow, and in doing so unintentionally hit another person, yet he is liable for the injury. In *Weaver v. Ward*, Hobart, 134, it was held, that trespass lies for a mere *mis-chance*, and that even a lunatic will be liable *civilliter* for his wrongful acts whereby another is injured. In *Fletcher v. Rylands*, L. R. Exch. 263, Lord CRANWORTH said: "When one is managing his own affairs and causes injury to another, however innocently, it is obviously only just that he should be the party to suffer." See, also, *Gibbon v. Pepper*, 1 Salk. 637; *Underwood v. Hewson*, 1 Stra. 596; *Leame v. Bray*, 3 East, 595; *Vandenburgh v. Truax*, 4 Denio (N. Y.), 464; *Guille v. Swan*, 19 Johns. (N. Y.) 381.

There is not a city of any considerable size in the world where there are not thousands of things tolerated that the law, following out the ordinary rules applied to such cases, would feel compelled to abate, but they are tolerated from necessity, and for the reason that even though they do produce some inconvenience, annoyance and discomfort, injury and damage even to a class, yet they cannot be dispensed with, and the necessity for their existence is allowed to outweigh the ill results. It was well said by Lord Chancellor WESTBURY in the case of *Tipping v. St. Helen Smelting Co.*, 116 Eng. Com. Law, 608, "If a man live in a town, he must of necessity submit to the consequences of the obligations of trade which may be carried on in his immediate neighborhood which are actually necessary for trade and commerce, also for the enjoyment of property, and for the benefit of the inhabitants of the town. If a man live in a street where there are numerous shops, and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground of complaint, because to him, individually, there may arise much discomfort from the trade carried on in that shop." In *Huckenstein's Appeal*, 70 Penn. St. 106, which was an action brought to restrain the defendant from carrying on the manufacture of brick, because of the injury sustained by the plaintiff to his grape-vines, and in the enjoyment of his dwelling-house from the vapors that were produced in the process of manufacture; AGNEW, J., in delivering the opinion of the court, said: "Brick-making is a useful and necessary employment, and is not a nuisance *per se*. *Attorney-General v. Cleaver*, 18 Ves. 219. It may, as many other useful employments do, produce some discomforts, some injury even to those near by, but it does not follow that the business should be enjoined therefor. The heat, smoke and vapor of a brick-kiln cannot compare with those of many manufactories carried on in the very heart of such cities as Pittsburgh and Allegheny. A court exercising the power of chancellor, whose arm may fall with crushing weight upon the every day business of men, destroying lawful means of support and diverting property from legitimate uses, cannot approach such cases as this with too much caution." In *Pasmore v. Commonwealth*, 1 Serg. & Rawle, 219, the court says: "Some actions, which would otherwise be nuisances, may

be justified by necessity. Thus a person may throw wood into the street for the purpose of having it carried into his house; so a merchant may have his goods placed in the street for the purpose of removing them to his store in a reasonable time, but he has no right to keep them in the street for the purpose of selling them there. So, because building is necessary, stones, brick, sand and other materials may be placed in the street, provided it be done in the most convenient place." In Burns' Justice, vol. 3, p. 320, the learned author says: "It hath been holden that it is no common nuisance to make candles in a town, because the needfulness of them shall dispense with the noisomeness of the smell." But he adds: "The reasonableness of this is justly questionable, because whatever necessity there may be that candles be made, it cannot be pretended to be necessary to make them in town; and, surely, the trade of a brewer is as necessary as that of a chandler, and yet it seems to be agreed that a brew-house erected in such an inconvenient place, wherein the business cannot be carried on without greatly incommoding the neighborhood, may be indicted as a common nuisance. And so in the case of a glass-house or swine-yard." There might be some disagreement with the learned author at the present day as to the equal necessity of a chandler and brewer, but he gives expression to the inconsistencies that have often been indulged in by courts when dealing with this class of wrongs. The rule in England was, in early times, extremely vascillating, the courts at times holding, as in *Jones v. Powell*, Palm. 198, 199, that *hurtfulness* was the gist of a nuisance, and at other times, as in *Toy-hales' Case*, cited in Cro. Car. 510, that "*hurtfulness* was not the question, but that if it rendered the property of others uncomfortable and incommodious, it is sufficient;" but the rule was definitely settled by Lord MANSFIELD in *Rex v. White*, 1 Burr. 337, where he held that "it was not necessary that the smell be unwholesome, but that it was enough if it rendered the enjoyment of life uncomfortable." The rule, as thus announced by Lord MANSFIELD, has been followed by the courts of England and this country with hardly an exception ever since it was promulgated. And as applied to that class of nuisances created by their effect upon the atmosphere, it would seem to be

the only true rule. But there has been much difference in the application of it as to the degree of discomfort that is necessary in order to warrant the court in applying it in given cases. But the rule, as announced by KNIGHT BRUCE, V. C., in *Walter v. Selfe*, which is given *infra* in this chapter, has been quoted with approval by many of the courts of this country, and is probably as nearly the correct test as can be adopted. *

In *Attorney-General v. Steward*, 4 C. E. Green (N. J.), 415, the court says: "Any trade or business lawful in itself, which from the place or manner of carrying it on materially injures the property of others, or affects their health, or renders the enjoyment of life physically uncomfortable, is a nuisance." In this case, the aid of the court by injunction was invoked to prevent the erection of a slaughter-house and pork-packing house in the city of Trenton, but over 700 feet remote from any dwelling-house. The court add: "There are certain things and certain trades which are considered as nuisances of themselves, as a slaughter-house in a thickly settled town, a pig-sty near a dwelling-house; and, perhaps, to these may be added, a fat-melting or rendering house, when carried on extensively in a populous neighborhood or near inhabited dwellings. *But these are not nuisances simply because they are erected within the limits of an incorporated city*, and the question, whether they will be a nuisance, depends upon the extent of business carried on there, and the manner in which it is conducted." In *Ross v. Butler*, 19 N. J. 294, the court were asked to restrain the carrying on of the business of burning pottery-ware in a certain building in the city of New Brunswick, upon the ground that the prosecution of the business there would fill the air with smoke and cinders, and produce great discomfort to those dwelling in the vicinity. The court, among other things, said: "The business is a lawful one; there can be no pretense that it is injurious to health, and it is a question of great practical importance in this State, where manufacturers flourish and are on the increase, whether such business can be permitted in the neighborhood of dwelling-houses, where the smoke and cinders render the dwellings uncomfortable to the inhabitants. It is not necessary, to constitute a nuisance, that the matter complained of should affect the health, or do injury to material property. It is

sufficient, in the language of SIR KNIGHT BRUCE, if it is "an inconvenience interfering materially with the ordinary comfort, physically, of human existence." The cases cited below adopt the rule as laid down by Lord MANSFIELD in *Rex v. White*.¹ It may be stated, *generally*, that neither the necessities of a trade nor its usefulness are permitted to prevent a party from obtaining proper redress for injuries arising therefrom, if the business is really a nuisance, either at law or in equity. But, however much the courts may ignore the idea in language, yet, in their application of the rules of law or equity to this class of wrongs, the importance, usefulness and necessities of a lawful business are allowed much weight. *This is necessarily so when the nuisance is not clear and unmistakable. The courts of Pennsylvania have gone farther in this direction than those of England, or any other State of this country. They have felt compelled to do this in order to protect their large manufacturing interests from destruction. In other words, the *necessities* of a leading business in the State have brought the courts up to the position of refusing to interfere, except in cases where the nuisance is so clear and unmistakable, as to furnish no reasonable excuse to a court for withholding its remedial aid. Particularly is this the case upon the equity side of their courts. The cases referred to will be cited hereafter, as well as those of other States.

SEC. 7. The law should not and does not deal with trifles.¹ The maxim "*de minimis non curat lex*" is as old as the law itself. Therefore, the law will not declare a thing a nuisance because it is unpleasant to the eye, because all the rules of propriety and good taste have been violated in its construction, nor because the property of another is rendered less valuable, nor because its existence is a constant source of irritation and annoyance to others. No fanciful notions are recognized. It does not pander to men's tastes, nor consult their mere convenience. It

¹ *Fish v. Dodge*, 4 Denio (N. Y.), 311; *Crump v. Lambert*, 3 Eq. Cas. 409; *Peck v. Elder*, 3 Sandf. (N. Y. Sup. Ct.) 126; *Howard v. Lee*, id. 281; *Washburne v. Wesson Iron Manufacturing Co.*, 13 Allen (Mass.), 94; *Barnes v. Hathorn*, 54 Me. 154; *Rhodes v. Dunbar*, 58 Penn. St. 275; *Davidson v. Isham*, 1 Stockt. (N. J.) 189; *Bamford v. Turnly*, 3 B. & S. 81; *Walter v. Selfe*, 4 Eng. L. & Eq. 20; *Simpson v. Savage*, 1 C. B. (N. S.) 347; *Rex v. Hill*, 2 C. & P. 488, and numerous other cases that will be hereafter referred to.

simply guards and upholds their material rights, and shields them from unwarrantable invasion. It recognizes no distinction in classes, ranks or conditions of life, but measures out the same even and exact justice to all. While it enforces with rigid exactness the principles of that time-honored maxim of the law, borrowed from the gospel rule, "*sic utere tuo alienum non lædas*," yet it gives it a reasonable application, and applies it only to those instances where the damage resulting, arises from a use of property in such a manner as violates a legal right of another.¹ In *Pickard v. Collins*, 23 Barb. (N. Y. Sup. Ct.) 458, STRONG, J., says: "It is the general rule that the owner of land may use it at his own pleasure. The rule is, however, subject to this qualification, that he is not allowed so to use it as to infringe the rights of others. The maxim of law, 'so use your own that you injure not another's property,' is supported by the soundest wisdom. But the injury intended is a legal injury, an invasion of some legal right."

In *Mahan v. Brown*, 13 Wend. (N. Y.) 261, SAVAGE, Ch. J., says: "The defendant has not so used his own property as to injure another. No one, legally speaking, is injured or damnified unless some right is infringed."

SEC. 8. Blackstone says, in vol. 3, p. 213 of his Commentaries, that "a nuisance is any thing that worketh hurt, inconvenience or damage," and we find this definition frequently referred to and adopted by writers who have treated upon this subject, as well as by courts, but it must be evident to every one who has investigated the subject, that the definition as conveying the legal import of the word, is not only erroneous, but that it is absolutely absurd, and is not supported by a single authority, either in Blackstone's time or since. It is true that "hurt, inconvenience and damage" are essential elements of a nuisance; that they are among the results that arise therefrom, but it is not true that every thing that produces those results is a nuisance. Nor is it ever true that the thing producing those results is a nuisance, unless it is done or exists in violation of a right. For illustration, A and B are the

¹ In *Citizens' Gas-light Co. v. Cleaveland*, 20 N. J. 209, the court says: "Where the injury is trifling there is no remedy at law, and, consequently, none in equity."

owners of adjoining lands, and A builds a house upon the extreme border of his land, next to that of B's. B, shortly afterward, excavates upon his own land, near to A's, and A's house, being deprived of the support of B's soil, falls into the pit which B has dug. Now A has sustained great hurt from B's act in digging the pit upon his land, in the destruction of his house; he has sustained great inconvenience in being deprived of its use, and in being compelled to take it out of B's pit in pieces; he certainly has sustained great damage in the loss of all that he has expended for labor in the construction of his house, and much that was expended for materials. Here we have the three elements, "hurt, inconvenience and damage" concurring, and yet even in Blackstone's time, and long before, it was held, that unless A had acquired a prescriptive right to the lateral support of B's land for his house, or had the right by grant, express or implied, B's act did not create a nuisance, and that A was remediless. *Wilde v. Minsterly*, 2 Rolle's Abr., tit. Pl. 1, 564; *Slingsly v. Barnard*, 1 Rolle, 430. It is also laid down in Rolle, 107, l. 20, that an action on the case does not lie upon a thing done to the inconvenience of another: as if a man erects a mill near to the mill of another, whereby the other loses a part of his profit, unless the first mill had acquired an exclusive right by lapse of time. It is also laid down by WRAY, J., in *Aldred's Case*, 9 Coke, 58, that a house built so as to hide the prospect of another is not a nuisance.

So in Comyn's Dig., vol. 1, p. 429, it is said that a "reasonable use of a right is not a nuisance, though it be to the annoyance of another: as if a butcher or brewer use his trade in a convenient place, though it be to the annoyance of his neighbor.

So in *Smart v. Stisted*, per ST. JOHN, at Suffolk Assizes in 1657, it was held, that if a man use water in his own land out of a water-course running through his land to the pond of B, whereby B's pond is not so full, he was not liable for a nuisance if he did not divert the water-course.

So in 1 Rolle, 558, l. 46, it is said that, in London, a house erected upon an ancient foundation, which obstructs the ancient lights of the adjoining house, is not a nuisance. And thus I might go on multiplying authorities existing in Blackstone's time,

to show that hurt, inconvenience and damage must result from the violation of some right, or no nuisance exists.

SEC. 9. It may be said, then, that a nuisance is an obstruction of or injury to a right, working essential inconvenience, annoyance, discomfort, injury or damage, and that unless an act or thing is in violation of a right, however much inconvenience, annoyance, discomfort, injury or damage may result therefrom, the act or thing is not a nuisance, and the party injured thereby is remediless. It must be borne in mind that, in order to constitute a nuisance, there must not only be a violation of a right, but that an essential inconvenience, annoyance, discomfort or injury must result therefrom. In *Walter v. Selfe*, 4 Eng. L. & Eq. 20, J. F. KNIGHT BRUCE, V. C., expresses the rule thus: "Ought this inconvenience to be considered in fact as more than fanciful, or as one of mere delicacy and fastidiousness? As an inconvenience, materially interfering with the ordinary physical comfort of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain, sober and simple notions among the English people." The rule, as adopted in this case, has been cited with approbation by nearly all the courts of this country. But a little reflection will show that, really, the rule is extremely indefinite, when taken literally and as a whole, that the inconvenience should be such as materially to interfere with the ordinary physical comfort of those affected thereby, and that mere delicacy and fastidiousness should not be allowed to furnish the standard by which the injury is to be measured, is of itself a rule that will usually be sufficient in any case; but when he adds that the degree of physical discomfort should be such as is suggested by plain, sober and simple notions among the English people, the rule loses its uniformity of application, and becomes subject to many fluctuations. As a measure of the degree of discomfort requisite to be produced in a given case, it would be dependent upon the peculiar notions of the people in the locality where the nuisance existed. But it was undoubtedly *intended* by the learned Chancellor to convey, by this language, the idea that the test of nuisance from such causes must be controlled by the circumstances of each case, and the habits, notions and ordin-

ary tastes and requirements of the people in the locality affected thereby, taking the simple and ordinary notions of ordinary classes as the test, rather than intending it as a fixed rule, that could be uniformly applied. In *Ross v. Butler*, above referred to, Chancellor ZABRISKIE, in referring to this rule, says: "The word 'uncomfortable' is not precise, nor does the phrase of Vice-Chancellor BRUCE, "according to plain and sober and simple notions among the English people," add much to making it definite: "In fact, *no precise definition* can be given, and each case has to be judged of by itself." The locality, the condition of property, and the habits and tastes of those residing there, divested of any fanciful notions, or such as are dictated by "dainty modes and habits of living," is the test to apply in a given case. In the very nature of things, there can be no definite or fixed standard to control every case in any locality. The question is one of reasonableness or unreasonableness in the use of property, and this is largely dependent upon the locality and its surroundings.

SEC. 10. In *Tipping v. St. Helen Smelting Co.*, 4 B. & S. 608, at the Assizes, Justice MILLOR instructed the jury, that "every man is bound to use his property in such a manner as not to injure the rights of his neighbor. But the law does not regard trifling inconvenience. Every thing must be looked at reasonably, and, therefore, where the injury complained of as a nuisance consists of noxious vapors arising in the lands of another, in order to be actionable, it must be such as sensibly to diminish the value of the property, and the comfort and enjoyment of it." The case was afterward heard in Exchequer and also in the House of Lords, and the ruling of Justice MILLOR was unanimously sustained. 116 Eng. Com. Law, 608. In *Barnes v. Hathorn*, Am. Law Reg., vol. 7, p. 82; 54 Me. 124, HUNT, J., in delivering the opinion of the court, says: "What is a nuisance? In considering this question, when the complaint is based upon the use by another of his own property, we are first met by the general doctrine of the right of every man to regulate, improve and control his own property; to make such erections as his own judgment, taste or interest may suggest; to be master of his own without

dictation or interference by his neighbor. On the other hand, we meet that equally well-established, and exceedingly comprehensive, rule of the common law, "*sic utere tuo ut alienum non lædas*," which is the legal application of the gospel rule of doing unto others as we would that they should do unto us.

The difficulty is in drawing the line in particular cases, so as to recognize and enforce both rules within reasonable limitations. It is quite clear that the law does not recognize a legal right in any one to compel his neighbor to follow his tastes, wishes or preferences, or to consult his mere convenience. He cannot dictate the style of architecture, or, generally, the location of the buildings; or maintain that an unsightly, ill-proportioned edifice is a nuisance, because it offends the eye or his cultivated tastes. Nor can he interfere, because he has idle and unfounded fears of ill effects from the use of the adjoining lot. There may be many acts which to the eye of others appear unneighborly, and even unkind, and entirely unnecessary to the full enjoyment of the property, vexatious and irritating, and the source of constant mental annoyance, and yet they may be but the legal exercise of dominion, and, therefore, cannot be deemed nuisances.

The diminution of the market value of adjacent buildings by such use will not of itself make it a nuisance; but there is a limit to such right. No man is at liberty to use his own without any reference to the health, comfort or reasonable enjoyment of like public or private rights by others. Every man gives up something of this absolute right of dominion and use of his own, to be regulated or restrained by law, so that others may not be hurt or hindered unreasonably in the use or enjoyment of their property. This is the fundamental principle of all regulated civil communities, and without it society could hardly exist, except by the law of the strongest. This illegal, unreasonable and unjustifiable use to the injury of another, or of the public, the law denominates a nuisance." The rule is well expressed in this opinion, and is a clear and correct statement of the principles which control this class of wrongs.

In *Ross v. Butler*, 4 C. E. Green (N. J.), 294, it was held, that "matters that are merely an annoyance, by being merely disagreeable or unsightly, as a well-kept butcher's shop, or a green grocery

near a costly dwelling-house, or any other business that attracts crowds of orderly persons, or numbers of carts and carriages, are not nuisances, even should they affect seriously the value of the property by driving away tenants, and prevent its being let to any one who pays high rent."

SEC. 11. Nuisances arise from a violation of the common law, and not from the violation of public statutes. Where a statute creates rights, and imposes certain penalties for their violation, the violation of the right so created is not a nuisance, and redress can only be had in the manner provided by statute.¹ Thus in *Bulbrooke v. Goodere*, 3 Burr. 1770, by statute of 1 Eliz., ch. 17, the taking of fish in the river Thames, except with certain nets and trammels named, was prohibited, and a penalty therefor was provided. The defendants, who were water bailiffs, found the plaintiff's bucks set in the river contrary to the statute, and destroyed them. The plaintiff brought this suit to recover the damage for the injury to his nets. The defendants justified, on the ground, first, that they were water bailiffs, and had jurisdiction over the part of the river in which the plaintiffs' nets were set, and second, upon the ground that the nets were set there contrary to the statute. Lord MANSFIELD said: "An offense was created by an act of parliament. If you take advantage of this act, you must follow the remedy prescribed by it. This was the defendant's own fishery, and he might have done what he would with it before the act." WILMOT, J., said: "This is not to be considered as a nuisance, either public or private. The violation of a public law is not within the idea of a nuisance." Mr. Justice GATES said: "The defendants are not to be their own judges; they should have followed the method prescribed by the act."

SEC. 12. But when a certain act or thing is a nuisance at common law, and the statute law also provides a remedy or imposes a penalty for the act, unless the statute, in express terms, takes away the common-law remedy, the party injured may pursue

¹ *Dudley v. Mayhew*, 3 N. Y. 15; 32 Me. 553; *Andover Turnpike Co. v. Behan v. The People*, 17 id. 517; *Smith Gould*, 6 Mass. 43; *Franklin Glass Co v. Lockwood*, 13 Barb. 217; *Renwick v. White*, 14 id. 286.
Morris, 7 Hill, 62; *Bassett v. Carleton*,

either at his election. Thus in *Renwick v. Morris*, 7 Hill, 575, which was an action to recover damages for the destruction of the plaintiffs' dam by the defendants, it appeared that the plaintiffs were authorized by the legislature to construct a dam across a navigable river, and that they constructed their dam under this act in such a way as to obstruct navigation, and the defendants abated the obstruction of their own motion. WALWORTH, Chancellor, in delivering the opinion of the court, said: "Where a new offense is created by statute, and a penalty is given for its violation, the penalty or remedy is confined to that given by statute; but giving a superadded penalty for the erection or continuance of a nuisance does not take away the common-law right of the public to have it indicted and removed as such. Nor does it prevent its being abated in the usual way by individuals, at the peril of showing that it was a nuisance, and that they did no unnecessary damage in removing it."

But when the statute creates a right, and provides no remedy for its violation, the violation of the right thus created will be regarded as a nuisance, and the party injured may have a remedy therefor as for a nuisance, either by action or otherwise.

SEC. 13. Nuisances arise, as has been before stated, from a misuse of property, real or personal, or from a person's own improper conduct. But the idea of a nuisance, generally, is associated with, and more commonly arises from, the wrongful use of real property. It is only in special and infrequent instances that it arises otherwise, which will be referred to and fully explained *infra*. They are always injuries that result as a consequence of an act done outside of the property injured, and are the indirect and remote effects of an act, rather than a direct and immediate consequence. It is a species of invasion of another's property by agencies operating entirely outside of the property itself, and imperceptible and invisible, except in the results produced, which are often even themselves not visible, and whose presence at times is only appreciable by one of the senses, and that, generally, not by the sense of seeing.

A trespass is a direct and forcible invasion of one's property, producing a direct and immediate result, and consisting usually

of a single act; but injuries of this class are indirect, and a consequence of a wrongful act, and continuous, and the fact of their continuousness is one of the main reasons that make them a nuisance. The rules of law, as applied to these wrongs, had their origin from, and are predicated upon, the maxim "*sic utere tuo alienum non lædas*," and the inconsistencies that sometimes have appeared in the judgments of courts when dealing with this branch of the law, have merely arisen from a difference in the construction of the true force and meaning of the rule. From a failure at all times to keep in view this fact, that there can be no legal injury except from the violation of a legal right. Lord Holt, in *Ashby v. White*, 2 Ld. Raym. 938, gave expression to the true construction of this rule of the law when he said, "A damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his rights." But when no right has been violated, it cannot, by any process of reasoning, be established that there is a legal injury or damage. The instances of "*damnum absque injuria*"¹ are very numerous, and are always injuries that result from a lawful act, for the law never recognizes an injury resulting from a lawful act as importing damages.

The maxim "*ubi jus, ibi remedium*" is as old as "*sic utere*," etc., and is the necessary adjunct of it, and yet no one ever supposed for a moment that it authorized a remedy, except to enforce a legal right. In giving force and effect to the maxim "*sic utere*," etc., the courts are always met by the right of parties to use their own property in every reasonable way, and neither justice nor public policy would tolerate the idea that a person should be made liable for damages resulting from a reasonable use of property. Therefore, in determining whether or not an injury has been done amounting to a nuisance, it is necessary to balance the rights of the parties in view of all the circumstances, and say whether or not the use of the property in the manner complained of is reasonable, and in accordance with the relative rights of the parties.

¹ *Wilde v. Minsterly*, 2 Rolle, tit. 1, Pl. 1, 564; *Wyatt v. Harrison*, 3 B. & A. 871; *Panton v. Holland*, 17 Johns. (N. Y.) 92; *Thurston v. Hancock*, 12 Mass. 220; *La Sala v. Holbrook*, 4 Paige's Ch. (N. Y.)

169; *Radcliffe's Executors v. Brooklyn*, 4 N. Y. 169; *Pryce v. Belcher*, 4 C. B. 866; *Gibbs v. Pisse*, 9 M. & W. 351; *Davies v. Jenkins*, 11 id. 145; *Roret v. Lewis*, 17 L. J. 99.

SEC. 14. Nuisances are either public, private or mixed. Public nuisances, strictly, are such as result from the violation of public rights, and producing no special injury to one more than another of the people, may be said to have a common effect, and to produce a common damage. Of this class are those intangible injuries that result from the immoral, indecent and unlawful acts of parties that become nuisances by reason of their deleterious influences upon the morals or well-being of society. Nuisances that arise from the acts of men, that for the time being make the property devoted to their purposes a nuisance, but which ceases to be so when the use is stopped: Such as disorderly houses, gaming-houses and cock-pits, that are "*malum in se*" and common nuisances purely, and only punishable by indictment. Of this class, also, are most purprestures, which are a class of public nuisances that result from the appropriation by one person to himself and to his own use of public property that should be common to all.²

SEC. 15. Private nuisances are injuries that result from the violation of private rights, and produce damages to but one or a few persons, so that it cannot be said to be public: As belonging to this class is the building of a house with the eaves projecting over the lands of another;³ or the erection of a building so as to hide the ancient lights of several persons;⁴ or a tinsmith's shop, the noise from which annoys the occupants of but three or four tenements.⁵

SEC. 16. Mixed nuisances are those nuisances that are both public and private in their effects: Public, in that they produce injury to many persons or all the public; and private, because at the same time they produce a special and particular injury to private rights, which subjects the wrong-doer to indictment by the public, and to damages at the suit of persons injured. Of this class are obstructions placed in a highway, which produce a spe-

² Ely v. Supervisors, etc., 36 N. Y. 297; Brown v. Perkins, 12 Gray (Mass.), 89; Grey v. Ayres, 7 Dana (Ky.), 375; Moody v. Supervisors, etc., 46 Barb. (N. Y. S. C.) 659; Hopkins v. Crombie, 4 N. H. 520; Graves v. Shattuck, 35 id. 257; State v. Paul, 5 R. I. 185. As to purprestures,

see Waterman's Eden on Injunctions, vol. 2, p. 259; 2 Coke's Inst. 38; Hargrave's L. T. 84.

³ Pendraddock's Case, 5 Coke, 100.

⁴ Wheaton's Selwyn, vol. 2, p. 350 Soltau v. De Held, 2 Sim. N. S. 143.

⁵ Rex v. Lloyd, 4 Esp. 200.

cial injury to one person, by injuring his horse, carriage or himself, while others of the public are only hindered, inconvenienced or delayed.¹ Also establishments which, by reason of the nature of the business carried on, produce such noxious smells and vapors as to annoy the whole community, and at the same time are a special injury to those residing or doing business in their immediate vicinity, by rendering their houses untenable, or their enjoyment so uncomfortable that they sustain a special and particular damage apart from and beyond the rest of the public.² These various classes will be treated fully in other chapters.

¹ *Rose v. Mills*, 4 M. & S. 101; *Barr v. Stevens*, 1 Bibb. (Ky.) 293; *Hughes v. Heiser*, 1 Binn. (Penn.) 463.

² *Bamford v. Turnley*, 3 B. & S. 66; *Tipping v. St. Helen Smelting Co.*, 4 id. 608; *Wesson v. Washburne Iron Works*, 13 Allen (Mass.), 95.

CHAPTER SECOND.

PUBLIC NUISANCES.

SEC. 17. Nuisances defined. Hawkins, vol. 1, p. 360.

18. Uses of property that create public nuisance.

19. Prescription for public nuisance not gained by time or usefulness of business; violation of individual rights not a public nuisance.

20. Public character and effects of public nuisance must be established.

21. Distinctions of the law in determining public nuisances in particular localities; rule adopted by the courts.

22. What constitutes a nuisance, question for the court; proof of facts sufficient, question for the jury.

23. Injuries affecting public morals; nuisances *per se*.

24. Wrongs *malum in se*.

25. House wherein offenses punishable by fine are committed; public nuisance; house in filthy condition; fast driving through public streets; publication of obscene literature.

26. Screening coal in public place; public exhibition of stud-horse, public nuisance.

27. Whether an act comes within the idea of a nuisance, care not an element.

28. Question one of results.

29. House of ill-fame, public nuisance; reputation not sufficient proof.

30. Owner indictable; evidence of his knowledge of its use being established.

- SEC. 31. Landlord jointly liable with tenant, civilly and criminally.
32. Nuisances affecting public morals abatable only by the courts.
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37. Disorderly houses, other than bawdy houses, common nuisances.
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39. Noise and violence not necessary elements to.
40. Owner not liable without proof of approbation and consent.
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42. Tippling house, where disorderly people congregate, common nuisance.
43. Doctrine of *Tanner v. Trustees* commented on and doubted; *Jacob Hall's Case*.
44. *Jacob Hall's Case*, continued.
45. *Jacob Hall's Case*, as reported in *Modern Reports*.
46. *Jacob Hall's Case*, as reported in *Ventris*.
47. Bowling alley, properly conducted, not a nuisance.
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49. Gaming houses, common nuisances; legal meaning of the term.
50. Husband and wife may be jointly indicted for keeping gaming house.
51. Innkeeper indictable, if his house is disorderly.
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53. Person setting up a lottery, punishable for common nuisance.
54. Fire-works, and their manufacture in public place, common nuisances.
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56. Theaters used for low and vicious plays, nuisances.
57. Common scold, common nuisance; offense confined to women.
58. Anger not an element of offense; practice must be habitual.
59. Eavesdroppers, common nuisances, punishable by fine.
60. Law regarding eavesdroppers salutary and just.
61. Indecent exposure of one's person in public place, a public nuisance.
62. Distinction between statutory and common-law offense.
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- SEC. 70. Contagious diseases: exposure of persons affected with.
71. Selling diseased meat, adulterated of persons affected with.
 72. Public exhibitions that corrupt morals, disturb the peace, etc.
 73. Keeping of combustible or explosive materials in public place; negligent keeping not regarded an element.
 74. Circulation of false reports, calculated to create false alarms, a public nuisance.
 75. General principles by which to determine public nuisances arising from uses of property.
 76. Noxious trades of a generally offensive character; persons liable for.
 77. Liabilities of landlord and tenant, master and servant.
 78. Municipal corporations indictable same as individuals.
 79. Use of property: within the legal idea of a nuisance?
 80. Length of time, or convenience of place, no defense.

SEC. 17. Hawkins says, in vol. 1, p. 360, of his Pleas of the Crown: "Offenses less than capital, more immediately against the subject and not amounting to a disturbance of the peace, which may be committed by private persons without any immediate relation to an office, and which are of an inferior nature to other offenses, being neither infamous nor grossly scandalous, seem to be reducible to the following heads: First, such as more immediately affect the public; secondly, such as more particularly affect the interests of particular persons. Common nuisances may be defined to be doing something to the annoyance of all the king's subjects, or by neglecting to do that which the common good requires. But annoyances to the interest of particular persons are not punishable by indictment as common nuisances are, but are left to be redressed by the private action of the party aggrieved by them."¹

¹ Bacon's Abr., vol. 7, p. 223; Burn's Justice, vol. 3, p. 418. "A public nuisance is such an inconvenient or troublesome offense as annoys the whole community in general, and not some particular person." 4 Bl. Com. 167. Whether a nuisance is public or not depends upon the number of persons annoyed by it, and is a question for the jury. *Rex v. White*, 1 Burr. 337; *Roscoe's Crim. Ev.* 788; *Jacob's Law Dic.*, tit. Nui.; *Lilly's Register*, vol. 2, A 307. An injury to several commoners only is a private nuisance. 9 Coke, 113 a. A public nuisance may be considered as an offense against the economical regimen of the State, either by doing a thing to the annoyance of all the king's subjects, or neglecting to do

that which the public good requires. *Russell on Crimes*, vol. 1, p. 294; 4 Bl. Com. 166. Whatever is injurious to a large class of the community, or annoys that portion of the public that necessarily comes in contact with it, is a public nuisance at common law. *Lansing v. Smith*, 8 Cow. 146. Any thing offensive to the sight, smell or hearing, erected or carried on in a public place, where the people dwell or pass, or have a right to pass, to their annoyance, is a public nuisance at common law. *Hackney v. State*, 8 Ind. 494. In *Attorney-General v. Sheffield Gas Co.*, 3 De Gex, M. & G. 304, it was held, that the digging of trenches in the public street for the laying of gas-pipes created a public nuisance, even though

Thus it will be seen that a public nuisance is a violation of a public right, either by a direct encroachment upon public rights or property, or by doing some act which tends to a common injury, or by omitting to do some act which the common good requires, and which it is the duty of a person to do, and the omission to do which results injuriously to the public.¹ Every person owes certain duties to the public, and the failure to discharge them, whereby the public is injured, is regarded at common law as a *quasi* crime. Among these duties is that of so using his own property as not to injure the public, being only an enlarged application of the maxim "*sic utere tuo alienum non lædas*," and only differing in its violation in this respect in the fact that it is treated as a public offense, and is punishable by fine or imprisonment, according to the circumstances and nature of the offense, besides rendering the property producing the injury to the extent necessary to prevent the injurious consequences, liable to removal either by judgment of the courts or at the mere motion of any individual suffering special damages therefrom.²

but small portions of the street were opened at one time, and those allowed to remain open in one place but a short time, for all had a right to pass, and all who came to the obstruction were injured thereby. In *Saltan v. De Held*, 2 Sim., N. S., 142, KINDERSLY, V. C., said, that to constitute a public nuisance, the thing complained of must be such as in its nature or its consequences is a nuisance, an injury or a damage to all persons who come within the sphere of its operations, though it may be so in a greater degree to some than to others. See, also, *Imperial Gaslight & Coke Co. v. Broadbent*, 7 H. L. Ca. 600; *Crowder v. Tinkler*, 19 Ves. 617; *Thorne v. Taw Vale Railroad Co.*, 10 Beav. 10, 21; *Regina v. Train*, 2 B. & S. 640; *Bostock v. North Staffordshire Railroad Co.*, 5 De G. & S. 584. In order to constitute a public nuisance, it must be of such a nature as to injure or annoy all who come within its sphere. *Commonwealth v. Smith*, 6 Cush. (Mass.) 80; *Commonwealth v. Ferris*, 5 Rand. 691; *Rex v. Medley*, 6 C. & P. 292; *Rex v. Webb*, 2 C. & K. 933. Some trades may be a nuisance in a populous or public place and not so in a retired place, even

though many choose to go there. *Ellis v. State*, 7 Blackf. (Ind.) 534; *Beatty v. Gilmore*, 4 Harr. (Penn.) 463; *Rex v. Pierce*, 2 Shawer, 327; *Ray v. Lynes*, 10 Ala. 63; *Rex v. Cross*, 2 C. & P. 483; *Rex v. Watts*, M. & M. 281; *Rex v. Carlisle*, C. & P. 636; *Regina v. Wing*, 2 Salk. 460; *Rex v. Neville*, Peake, 91.

¹ 4 Bl. Com. 166; 2 Rolfe's Abr. 83; *Lansing v. Smith*, 8 Cow. 146; 1 Russell on Crimes, 295. See chapter on *Purprestures*, *infra*.

² *Rex v. Rosewell*, 2 Salk. 459; *James v. Hayward*, Jones 222, 223; *Penraddock's Case*, 5 Coke, 100; *Baten's Case*, 9 id. 53; *Mayor of New York v. Board of Health*, 31 How. Pr. 385. A public nuisance can only be abated by the party injured. *Griffith v. McCullum*, 46 Barb. 561. In *Dimes v. Petley*, 15 Q. B. 276, it was held, that an individual cannot justify damaging the property of another, on the ground that it is a nuisance to a public right, unless it does him a special injury. *Brown v. Perkins*, 12 Gray (Mass.), 89; *Harrower v. Ritson*, 37 Barb. (Sup. Ct. N. Y.) 301; *Browning v. New Orleans Canal Co.*, 12 La. 541; *Bateman v. Bench*, 18 Q. B. 870; *Wales v. Stetson*, 2 Mass. 143; *Arundel v. McCulloch*, 10 id. 70.

SEC. 18. In order to make the use of property in a particular manner a public nuisance, it must be to the common annoyance of the public—that is, it must be so extensive in its consequences that they cannot be said to be confined to a few persons;¹ or it must be in a public place, as on a public road or street,² so as to seriously offend and annoy those who lawfully pass. For even works that are a nuisance *per se* may be lawfully carried on in a convenient place:³ As in a place so far removed from habitations and public roads, or navigable streams, as to produce no injurious or offensive results to any except such as pass them casually or from curiosity.

But when any such trade or business is thus established in a convenient place, removed from dwellings and public ways, even though it has been carried on there for many years, yet when the place becomes inconvenient, by reason of public roads being laid so near it that it becomes materially offensive to those passing upon them, or when other business is established in its vicinity which is not a nuisance, and which is injuriously affected thereby, by being offensive to those who work there or come there to trade, or when numerous dwellings are erected in its vicinity, to which it is a serious annoyance, it becomes a public nuisance, and must yield to the public necessity and to the demands of the public interest, notwithstanding that it has been carried on there for more than a century, for no amount of time works a prescription for a public nuisance or other public offense.⁴

¹ *Rex v. White*, 1 Burr. 333. In *Rex v. Lloyd*, 4 Esp. 200, Lord ELLENBOROUGH held, that where the business of a tinman annoyed but a few persons, occupying chambers in Clifford's Inn, it was not so common in its effects as to make the shop-keeper indictable.

² *Lansing v. Smith*, 8 Cow. 146; *Hackny v. State*, 8 Ind. 494; *People v. Cunningham*, 1 Denio, 524; *Rex v. Pappineau*, 1 Stra. 686.

³ *Tipping v. St. Helen Smelting Co.*, 116 Eng. Com. Law, 608; 2 Rolle's Abr. 140; Hutt. 136; Palm. 536; 2 Lilly's Register, 309, F.

⁴ In *Fowler v. Sanders*, Cro. Jac. 446, it was held, that no length of time

would prescribe for a nuisance. In *Weld v. Hornby*, 7 East, 199, it was held, that it was no defense, in a prosecution for a nuisance, that it had been acquiesced in for more than twenty years. In *Rex v. Cross*, 3 Camp. 227, Lord ELLENBOROUGH said: "No length of time will render a nuisance legal." See, also, *State v. Phipps*, 9 Ind. 515; *Elliotson v. Feetham*, 2 Bing. (N.C.) 283; *Mills v. Hall et al.*, 9 Wend. (N. Y.) 315; *Commonwealth v. Tucker*, 2 Pick. 44; *Elkins v. State*, 2 Humph. 543; *Commonwealth v. Alberger*, 1 Wheat. 469; *People v. Cunningham*, 1 Denio, 524; *Lynch's Case*, 6 City Hall Recorder, 61.

SEC. 19. Therefore, it is no defense to an indictment for erecting or maintaining a nuisance, that the business, trade or occupation has for a long time been carried on in the locality designated without complaint from any one, although it might be a good defense to a private suit for the recovery of damages.¹ Neither is it a defense in any measure that the business is a useful one, that it is necessary, or that in its products and operations it is a public benefit, and contributes largely to the enhancement of the wealth, prosperity and commercial importance of the community,² for if it is really a nuisance, or operates as such upon the public, no measure of necessity, usefulness or public benefit will protect it from the unflinching condemnation of the law; although, unless the business is a nuisance *per se*, these facts have weight, both with the court and with the jurors, in determining the degree of injury thereby produced, and whether the effects are so annoying, so productive of general inconvenience and discomfort, that it can be said to be really so prejudicial to the public as to be a nuisance. To constitute a public nuisance from the use of real property, the same degree of injury must be established as to sustain a recovery at the suit of an individual, the only difference being,

¹ *Weld v. Hornby*, 7 East, 199; *Commonwealth v. Vansickle*, Brightly R. 69.

² In *Queen v. Train*, 2 B. & S. 640, it was held, that where a railroad track was laid in a highway, so that horses, in stepping upon it, slipped and were frightened, it was a nuisance. In *Works v. Junction Railroad Co.*, 5 McLean, 425, it was held, that a nuisance could not be tolerated, on the ground that the community derived benefit from it. In *Republia v. Caldwell*, 1 Dall. (U. S.) 150, it was held, that it is no defense to an indictment for a nuisance that it is of great public benefit. *Regina v. Barry*, 9 Law R. 122; *Roscoe's Crim. Ev.* 738; *Hart et al. v. Mayor, etc.*, 9 Wend. (N. Y.) 571, 582. In 2 *Lilly's Register*, 809, it is said, "Melting lead so near to plaintiff's land that it spoiled his grass and wood there growing, and whereby he lost two horses and a cow pasturing there, is a nuisance, and the fact that it is a lawful trade, and for the benefit of the nation and necessary, does not excuse the action." 2 *Rolle's Abr.* 140, 141; *Ross v. Butter*, 19 N. J. 296; *Jones v.*

Powell, Hutt. 136; *Palm.* 536; *Rhodes v. Dunbar*, 4 P. F. Smith (Penn.), 84; *Ward's Case*, 4 A. & E. 384; 31 Eng. Com. Law, 92; *Morris' Case*, 1 B. & A. 441; 20 Eng. Com. Law, 421; *St. Helen Smelting Co. v. Tipping*, 4 B. & S. 616. In *Rex v. Russell*, 6 B. & C. 566, it was held, that, in some cases, where the public health is not concerned, the public good it does may be taken into consideration, to ascertain if the public benefit outweighs the public annoyance, but the doctrine of this case was directly overruled by the court in *Rex v. Ward*, 4 Ad. & El. 384, and it was said that public benefits were not to be considered; and still later, in *Rex v. Tindall*, 6 Ad. & El. 143, the doctrine of *Rex v. Ward* was adopted. Also, see *Rex v. Morris*, 1 B. & A. 441, in which the doctrine was repudiated by Lord TENTERDEN; and in *Beardmore v. Treadwell*, 31 L. J. N. S., Q. B., 286, in 1862, it was held, that the fact that a brick-kiln was established for the manufacture of bricks for government fortifications was no defense.

that the injury and damage must be shown to be common to many, instead of only applying to one or a few individuals.¹ Indeed, in all instances of a tangible kind—that is, in all nuisances, except those whose effect is of a moral character rather than a positive injury to property—there must be the same degree of injury and damage that would be necessary to maintain a suit for damages, with this addition: that the injury and damage resulting therefrom must be so extensive as to affect many persons at one and the same time, so that the injury can fairly be said to result to citizens as a part of the public, rather than to them individually. The grant of a franchise to operate a railroad does not confer power upon it to use locomotives so constructed as to throw out burning coals that may set fire to buildings along the line; but the road must be so operated as to cause the least danger. This is not a public nuisance, although it may injure many persons. A nuisance is only public when it affects the rights of citizens injured as a part of the public. The reason why this is not a public nuisance is, because the effect of the cause is not common, nor caused by one and the same act. The defective machine may cause injury to many persons, but the injury is occasioned by distinct acts, and at different periods of time, so that it cannot be said to be a common cause or a common injury. As a further illustration, if a railroad company, in the absence of a contract with the land-owners, is bound to fence its road, a neglect to do so is a nuisance, and subjects the company to liability to land-owners for all damages sustained from such neglect, but this does not subject the company to indictment, for it can in no sense be said to be a common injury to the rights of individuals as a part of the public, but is a violation of individual rights, which may or may not result injuriously, according to the diverse circumstances that control the use of each individual's land. The injury cannot by any possibility become common. All may sustain damages therefrom, may be injured thereby, but the injury cannot happen from the same act or at the same time to all. One may be injured and damaged there-

¹ *Commonwealth v. Smith*, 6 Cush. 292; *Soltau v. De Held*, 9 E. L. & Eq. 20; (*Mass.*) 80; *Regina v. Webb*, 2 C. & K. 930; *Commonwealth v. Farris*, 5 Rand. 691; *Rex v. Medley*, C. C. & P. 25 Me. 297; *People v. Jackson*, 7 Mich. 432; *State v. Rye*, 35 N. H. 368; *State v. Strong*, 25 Me. 297.

from to-day and another to-morrow, or possibly never.¹ But if the company neglect to provide suitable cattle-guards and fences at road-crossings or at the side of a public highway, this is clearly a common nuisance,² for which it may be indicted, for every citizen has a right to have his cattle and property pass along a highway secure from such danger as is incident to the operation of a railroad. The distinction arises from the fact that every person has a right to pass over a highway with his property at any time, and any unreasonable act or thing that endangers his own safety or that of his property is a common nuisance.³

SEC. 20. It is not necessary to establish the fact that the ill effects are applicable to an entire community, or that they are the same in their effects upon all who come within their influence, or that the same amount or degree of damage is done to each person affected by it, for in the very nature of things this would be impossible.* Those in the immediate vicinity of the erection or thing complained of might sustain a special injury and damage for which they could maintain a private suit, while others might sustain no special injury apart from the rest of the community, and thus would have no redress except through the intervention of a public prosecution. It is sufficient to show that it has a common effect upon many as distinguished from a few. Where the thing complained of is in a city or town, or upon a public highway or street, little difficulty can be experienced in establishing its public character and effects, for any thing which can produce a nuisance that extends over a highway, street or other public place, where people pass and repass, and have a lawful right to be or congregate, and produces material annoyance, inconvenience, discomfort and injury to those exercising those rights, is a public nuisance, and punishable as such.*

¹ *Soltau v. De Held*, 9 E. L. & Eq. 20; *King v. Morris & Essex Railroad Co.*, 3 C. E. Green (N. J.), 377.

² *Pease's Case*, 4 B. & Ad. 30; *Morris' Case*, 1 id. 441; *Commonwealth v. Lowell & Nashua R. R. Co.*, 2 Gray (Mass.), 54; *Weld v. Gaslight Co.*, 1 Stark. 211.

³ *Weir v. Kirk*, 1 Law Times, 60; *Rex v. Pappineau*, 1 Str. 686; *Dewey v. White, Moody & M.* 56; *Jones v. Railroad Co.*, 107 Mass. 261; *Judd v.*

Fargo, id. 264; *Murphy v. Dean*, 101 id. 455; *Shepley v. Fifty Associates*, id. 251; *Commonwealth v. Blaisdell*, 107 id. 234; *United States v. Hart, Peters' C. C. (U. S.)* 390.

⁴ *Soltau v. De Held*, 9 Eng. Law & Eq. 20.

⁵ *Rex v. Pappineau*, 1 Str. 686; *Michael v. Alestree*, 2 Lev. 172; *Dixon v. Bell*, 5 M. & S. 198; *Hammond v. Pearson*, 3 Camp. 396.

SEC. 21. But many kinds of business that would be regarded as a nuisance upon a street that is densely populated and much traveled, or that is occupied for business purposes of such a character as naturally make it what is called a thoroughfare, would not be such upon a less populous street, or one that is not so much used by the public; and the same is also the case with business upon ordinary country roads, the same distinction existing between those which are much traveled and those which are but little used by the public.¹ It would be an arbitrary and unwarrantable rule that would make no distinction between a street or highway but little used by the public, and one that is a leading thoroughfare, over which large numbers of people are daily passing; or between a street that is built up with elegant residences and stores, or business places, and the presence in the vicinity of which a certain kind of business would be a serious annoyance and damage, and one that is occupied with cheap buildings, and for purposes such that the presence of the same business would be of little or no annoyance, and would operate to produce no special damage. The law does, from the necessity of things, make this distinction in determining whether a particular business is carried on in a convenient place.² Thus, a blacksmith shop would not for a moment be tolerated upon a principal street of a city in the vicinity of costly buildings and fashionable business places, except it was kept up and maintained in a way so as to produce no possible annoyance or injury;³ but, from the needfulness of the business, it is tolerated upon streets in less important parts of the city, and the smoke and cinders arising therefrom, as well as the noisy reverberations from the heavy strokes of the sledge-hammers on its numerous anvils in the prosecution of the business, is permitted, even without the aid of special ordinances. And so it is with a thousand occupations of a similar character

¹ *Ellis v. State*, 7 Blackf. (Ind.) 534; *Rex v. Pierce*, 2 Shower, 327; *Rex v. Cross*, 2 C. & P. 483; *Rex v. Watts*, M. & M. 281; *Regina v. Wigg*, 2 Salk. 460; *Beatty v. Gilmore*, 4 Harr. (Pa.) 463; *Queen v. Ayres*, 10 Ala. 63; *Rex v. Carlisle*, 6 C. & P. 636; *Rex v. Neville*, Peake, 91.

² *Walker v. Brewster*, 5 L. R. Eq. Cas. 24-27; *Att'ny-Gen'l v. Steward*, 9 Am.

Law Reg. 387; *Sparhawk v. Railroad Co.*, 4 P. F. Smith (Penn. St.) 401; *Huckenstine's Appeal*, 70 Penn. St. 102; *Rhodes v. Dunbar*, 7 P. F. Smith (Penn. St.), 287; *Tipping v. St. Helen Smelting Co.*, 4 B. & S. 608.

³ *Tipping v. St. Helen Smelting Co.*, 116 Eng. Com. Law, 608; *Ross v. Butler*, 19 N. J. 294; *Wolcott v. Mellick*, 3 Stockt. (N. J.) 207.

which we have not the space to enumerate. The rule adopted by the courts with reference to every business, except such as are nuisances *per se* or *prima facie*, in determining whether it is a public nuisance in a particular locality, in other words, in determining whether it is prosecuted in a convenient place, is to inquire whether it produces a common damage to the property in the vicinity, or is reasonably likely to do so, or whether it is in fact a public annoyance and inconvenience to such an unwarrantable extent as to require the intervention of a fine and the abatement of the business.¹

SEC. 22. As to what constitutes a nuisance, as well as the question of convenience, are questions to be determined by the court, not by the jury; * also, whether the facts, if proved in a given case under all the circumstances, produce such results as amount to a nuisance; but whether the results are so common as to amount to a public nuisance, is a question for the jury.

SEC. 23. There are classes or kinds of business which are nuisances *per se*, and the very fact that they are carried on in a public place is *prima facie* sufficient to establish the offense.* But in such cases, if the respondent questions that the use of his property in the manner charged in the indictment produces the effects set forth therein, and introduces evidence to sustain his position, it then becomes necessary to prove that the effects are such as are charged. But there are a class of nuisances arising from the use of real property and from one's personal conduct that are nuisances *per se*, irrespective of their results and location, and the existence of which only need to be proved in any locality, whether near to or far removed from cities, towns or human habitations, to bring them within the purview of public nuisances. This latter class are those intangible injuries which affect the morality of mankind, and are in derogation of public morals and public decency.

¹ Tipping v. St. Helen Smelting Co., 4 B. & S. 608.

² Tipping v. St. Helen Smelting Co., 4 B. & S. 608; State v. Atkinson, 23 Vt. 92.

³ State v. Atkinson, 23 Vt. 92; Peck

v. Elder, 3 Sandf. Sup. Ct. (N. Y.) 126; Howard v. Lee, 3 Sandf. 281; Catlin v. Valentine, 9 Paige (N. Y.), 375; Attorney-General v. Steward, 4 C. E. Green (N. J.), 415.

SEC. 24. This class of nuisances are of that aggravated class of wrongs that, being *malum in se*, the courts need no proof of their bad results, and require none. The experience of all mankind condemns any occupation that tampers with the public morals, tends to idleness and the promotion of evil manners, and any thing that produces that result finds no encouragement from the law, but is universally regarded and condemned by it as a public nuisance.¹ In the following pages I shall enumerate a large number of occupations and practices that have been declared nuisances, together with the penalties that have been applied to them by the common law. It cannot be expected that I can give a list of every possible public nuisance, for it must be understood that whether a particular occupation, act or thing has been declared a nuisance or not, is a matter of small importance. If it comes within the rules that have been established by the courts, and such as have been dictated by the highest wisdom and soundest public policy, and is productive of the ill results that characterize these wrongs, it is a public nuisance, and will be punished as such, although the offense is new and has never before been specifically classified as such.

SEC. 25. In *Smith v. Commonwealth*, 6 B. Monr. (Ky.) 21, it was held, that a person who keeps a house, wherein offenses punishable by fine are committed, is a nuisance, because such places are in derogation of public morality, and draw together dissolute people. In *State v. Purse*, 4 McCord, 472, it was held, that a house kept in a filthy and negligent condition is a public nuisance, because it endangers the public health and safety. In *United States v. Hart*, Pet. C. C. (U. S.) 390, it was held, that a person who drives his horses through the public streets, so as to endanger the lives of those who are passing, is guilty of a public nuisance, because the public safety is paramount law, and any act which endangers it is within the idea of a nuisance. In *State v. Harrison*, 23 Tex. 232, it was held, that the publication of an obscene newspaper is a public nuisance, because in derogation of public morals and decency.*

¹ *Ely v. Supervisors*, 36 N. Y. 297.

SEC. 26. In *Commonwealth v. Mann*, 4 Gray (Mass.), 213, it was held, that the defendant was subject to indictment for a common nuisance, for screening coal in a public place so that it annoyed the neighborhood. In *Mayor v. Nolin*, 4 Yeig. (Tenn.) 117, it was held, that exhibition of a stud-horse in a public street is a nuisance, and indictable as such, because in violation of public decency.

SEC. 27. In *State v. Taylor*, 29 Ind. 517, it was held, that urinating in a spring at which the public are accustomed to drink is a public nuisance. And thus I might enumerate hundreds of instances where certain acts have been held to constitute a public nuisance that had never been directly held so before by the courts. The question is not whether an act has been declared to be, but does it come within the idea of a nuisance? If so, it is a nuisance, though never before held so; if not, it is not a nuisance, though held so in a thousand instances before; and whether the facts essential to constitute the offense are established in a given case, is always a question for the jury.¹ But where the act is a public nuisance *per se*, as an encroachment upon public property, or the doing of an act in derogation of public morals, it is only necessary to know the act, and the question of effect will not be submitted to the jury.² It is no defense, in a prosecution for a nuisance, to show that the business is carried on in the most prudent and careful manner possible; that the most approved appliances known to science have been adopted to prevent injury (except where the legislature or other competent authority has authorized a certain act).³ The question of care is not an element in this class of wrongs; it is merely a question of results, and the facts that injurious results proceed from the business under such circumstances would have a tendency to show the business a nuisance *per se*, rather than to operate as an excuse or defense, and the courts would feel compelled to say that, under such cir-

¹ *Pitcher v. Hart*, 1 Humph. (Tenn.) 524; *Gates v. Blance*, 2 Dana, 158.

² In *State v. Atkinson*, 23 Vt. 92, which was an indictment for making an erection on a public common, the court held, that where the act constituting the nuisance consisted in taking

lands dedicated to public use, it was a nuisance *per se*, for which there could be no justification; and refused to leave the question to the jury, whether the act amounted to a nuisance. *

³ *Fletcher v. Ryland*, 1 Law R. 265; *Smith v. Fletcher*, Exch., June, 1872.

circumstances, the business is intolerable, except so far removed from residences and places of business as to be beyond the power of visiting its ill results upon individuals or the public.¹

§20. In *Tremain v. Cohoes Co.*, 2 N. Y. 163, which was an action against the defendant, a corporation established by the legislature, and authorized by the terms of their charter to dig a canal to convey the water from the river to their mills. In excavating the canal they blasted rocks, pieces of which were thrown upon the plaintiff's dwelling, breaking the stoop and the doors and windows of his house. In that case the defendants offered to show that they proceeded with the highest degree of care and skill, but the court held that the evidence was not admissible; the court said, "the actual damage would be the same, whatever might be the motive for the act which caused it; *how* they did their work is of no consequence; what they did to the plaintiff's injury is the sole question." In a suit for private damages, where exemplary damages or damages beyond the actual damages are claimed, the evidence would be admissible; but in a prosecution for such injuries, the question is one of results, and not of motives. The injury is confined wholly to what was done, and what its effect was upon the community, and whether the effect is such as to constitute the business or use of the property in the manner set forth in the indictment, a common nuisance within the provisions of the law.²

¹ *Tremain v. Cohoes Co.*, 2 N. Y. 163; *Hay v. Cohoes Co.*, id. 159; *Cahill v. Eastman*, 18 Minn. 324; 10 Am. R. 184. In *Fletcher v. Ryland*, 1 Law R. 285, BLACKBURN, J., says: Some years ago actions were brought against the owners of some alkali works in Liverpool for the damage alleged to have been occasioned by the chlorine fumes from their works. The defendants proved that they, at great expense, erected contrivances by which the fumes of chlorine were condensed and sold as muriatic acid, and they called a great body of scientific evidence that this apparatus was so perfect, that no fumes could possibly escape from their chim-

ney. But the jury found otherwise, and no attempt was made to disturb the verdict, on the ground that the defendants had taken all the precautions that prudence and skill could suggest to keep the fumes in, and that they were not liable, unless negligence was shown. If they had, the answer would have been, that he whose stuff it is must keep it in at his peril. *Tenant v. Golding*, 2 Ld. Raym. 1089; *Sutton v. Clark*, 6 Taunt. 44; 1 Hale's P. C. 430; *Cox v. Burbridge*, 32 L. J. C. P. 89; *Comyn's Dig., Droit*, M. 2; *Fitzherbert's Nat. Brevium*, 128.

² *Hay v. Cohoes Co.*, 2 N. Y. 159; *Lawson v. Price*, 45 Md. 135.

BAWDY HOUSES.

SEC. 29. A house of ill-fame or bawdy house, as it is more commonly called in the law, is a public nuisance, and the keeper thereof may be indicted therefor whether the house is located in a city or a forest. It is "*mala in se*," and the court does not need to be informed of its effects upon society, for the common experience of mankind shows that the probable and natural consequences of such an establishment will be detrimental to the moral and social welfare of the public.¹ It is not necessary in order to establish this offense to show that the house has actually been resorted to for the purposes of prostitution; it is sufficient to show that it is ostensibly kept for that purpose, and held out as such by the person keeping it.² But if this cannot be shown it must be proved such by actual acts of prostitution,³ or of such habitual lascivious acts of the lodgers there, to the knowledge of the keeper, and of a public character, that no doubt can exist as to the real character of the house and purpose of the keeper.⁴ Mere reputation is not sufficient, for that is often wholly unreliable and unworthy of credence,⁵ but when accompanied with evidence showing the dissolute character of the inmates, and of the persons visiting there, it is admissible as tending to establish the offense.⁶ But mere reputation that a person charged with being the keeper is such, is not admissible to show that she was such.⁷

SEC. 30. Not only is the person keeping the house liable to indictment, but the person letting it knowing the purpose for which it is to be kept is also chargeable, and punishable therefor

¹ 1 Hawkins' P. C. 362; 1 Rolle's Abr. 109; Queen v. Williams, 1 Salk. 384; People v. Rowland, Criminal Recorder (N. Y.), 286; People v. Clark, id. 288; State v. Munroe, 7 Clarke (Iowa), 406; Commonwealth v. Howe, 13 Gray (Mass.), 26; Commonwealth v. Hart, 9 id. 465; Commonwealth v. Davis, 11 id. 48; Commonwealth v. Floyd, 11 id. 52; Hackney v. State, 8 Ired. 494; Hunter v. Commonwealth, 2 S. & R. (Penn.) 288; Clementine v. State, 14 Mass. 112.

² Tanner v. Trustees, 5 Hill (N. Y.), 121. Opinion of COWEN, J.

³ State v. Hand, 7 Clarke (Iowa), 411.

⁴ Mary Rathbone's Case, 1 City Hall Recorder (N. Y.), 26; Commonwealth v. Howe, 13 Gray (Mass.), 26; United States v. Stearns, 4 Cranch C. C. 341; Harwood v. People, 26 N. Y. 190.

⁵ U. S. v. Jourdine, 4 Cranch C. C. 338; State v. Hand, 7 Iowa, 411; People v. Maunch, 24 How. Pr. (N. Y.) 276.

⁶ Com. v. Howe, 13 Gray, 26; Commonwealth v. Hart, 9 id. 465; United States v. Gray, 2 Cranch C. C. 675.

⁷ State v. Hand, 7 Iowa, 411.

the same as the actual keeper thereof.¹ But in order to charge the owner for permitting his house to be used for that purpose, it must be proved by positive acts or declarations that he assents thereto after learning the purpose to which the premises are devoted.² Mere neglect to take measures to stop the business by prosecution or otherwise is not sufficient. Neither is a failure to eject the party from the premises when he might do so. It is necessary to show that he actually consents to the use of the premises for the purpose, or aids, advises and assists therein.³ But it would seem that a renewal of the lease after the term has expired, or permitting the party to remain after the expiration of the term, knowing the uses to which the premises have been devoted, would be sufficient to involve him in the common-law offense.⁴ In an indictment against the landlord for this offense, he may be charged directly as the keeper of the house,⁵ or he may be charged with the offense according to the facts, to wit: with letting the premises to be used as a bawdy house, knowing the purpose for which they were to be used.⁶ In the case of the *People v. Erwin*, 4 Denio, 129, it was proved that the respondent rented the house to one Clark to be used as a bawdy house, and that as a consideration for such unlawful use he received double the rent for which the premises could otherwise be rented. He was indicted as keeper of the house, and although it was shown that he had no management of or control over the house, and never aided or assisted in the keeping of the same in any other way than to receive his rent therefor, he was convicted, and the supreme court held that the conviction was right, and the doctrine of this case was favorably commented upon in the case of *State v. Williams*, 30 N. J. 102, and is abundantly sustained in principle by authorities, although it seems somewhat anomalous. In a recent English case, *Regina v. Stannard*, 3 Leigh C. C. 349, a different view was entertained and a contrary

¹ *People v. Erwin*, 4 Denio (N. Y.), 129; *Commonwealth v. Harrington*, 3 Pick. 26.

² *State v. Abraham*, 6 Iowa, 118; *State v. Williams*, 1 Vroom. (N. J.) 102; *Lowenstein v. People*, 54 Barb. (N. Y. Sup. Ct.) 299.

³ *State v. Williams*, 1 Vroom. (N. J.) 112.

⁴ *State v. Williams*, 28 N. J. 102; *People v. Erwin*, 4 Denio (N. Y.), 129; 1 Bishop on Crimes, 1095; *Pedley's Case*, 1 Ad. & E. 322; 28 Eng. Com. Law, 220.

⁵ *People v. Erwin*, 4 Denio (N. Y.), 129.

⁶ Bishop on Crimes, 1095.

doctrine held. In that case the respondent was indicted for keeping a bawdy house. It appeared that he was the owner of a tenement house, and let the rooms therein to prostitutes for the purposes of bawdry. He did not reside in the house, or have the keys to any part of it; he collected the weekly rents, and had the power to eject them, but neglected and refused to do so. He had no part of their earnings, and no interest in or control over their business, except to take his rent as it became due. Some times when complaints were made to him by the residents in the neighborhood that the tenants disturbed the neighborhood by their noise, he would attempt to dissuade them. On this evidence the defendant was convicted, but upon a hearing by the judges on a case made, the conviction was set aside, POLLOCK, C. B., remarking: "There was no keeping of the house by the defendant; he was only the owner of the house, letting it to another, who used it for improper purposes, with which the defendant had nothing to do." It is true that, strictly, the defendant was not the actual keeper of the house, but if he rented the house knowing that it was to be used as a bawdy house, or, if knowing the purposes to which the house was devoted, after the expiration of the term, he renewed the lease, he was clearly liable, and the statement of POLLOCK, J., that he was in no sense liable as keeper of the house is contrary to all the authorities, and clearly wrong in principle. The learned judge forgot, evidently, that the defendant was simply charged with a misdemeanor, and that whether present or absent, if he promoted the principal act in any measure, he was liable as a principal, there being no accessories to a misdemeanor.¹ Following the rule adopted by the court, there could never be an indictment against a landlord for a nuisance maintained by a tenant upon demised premises, even though done by his express consent. But a contrary doctrine has uniformly been held by the courts of both this country and England ever since

¹ *Sanders v. The State*, 18 Ark. 198; *Wheeling v. Commonwealth*, 6 Grat. (Va.) 706; *Regina v. Tracy*, 6 Mod. R. 30; *State v. Westfield*, 1 Bail. (S. C.) 132; *Floyd v. The State*, 7 Eng. 43; *Regina v. Greenwood*, 9 Eng. L. & Eq. 535; *Commonwealth v. McAtee*, 8 Dana (Ky.), 28; *Rex v. Dixon, Maule & Selw.* 11.
People v. Erwin, 4 Denio (N. Y.), 129; *Rex v. Douglass*, 7 C. & P. 744; *United States v. Mills*, 7 Pet. 178; *Commonwealth v. Gillespie*, 7 S. & R. (Penn.) 467; *State v. Cheek*, 7 Ired. (N. C.) 114; *Williams v. The State*, 7 Sm. & M. (Miss.) 58; *Caslin v. State*, 4 Yerg. (N. C.) 143; *State v. Symbarn*, 1 Breese (Ill.), 397;

courts were established. The learned judges must have lost sight entirely of the principles controlling this class of wrongs. If any servant in the course of my employment, but without my knowledge, and even contrary to my orders, creates a public nuisance, as by obstructing a public highway, or polluting the waters of a stream, I am liable therefor civilly and criminally, even though in the view of the learned judge I could in no sense be said to have done the act.¹ In *Rex v. Medley*, 6 C. & P. 292, the directors of a gas company were held liable upon an indictment for acts done by their superintendent and engineer under a general authority to manage the works, although they were personally ignorant of the particular plan adopted, and which was a departure in fact from the one originally agreed upon, and when they supposed that the original design was being carried out. DENMAN, C. J., said: "It seems to me both common sense and law, that if persons, for their own advantage, employ servants to conduct works, they must be answerable for what is done by those servants."

SEC. 31. Thus, it will be seen that it is not necessary, in order to charge a person with criminal liability for a nuisance, that he should commit the particular act that creates the nuisance; it is enough if he contributes thereto either by his act or neglect, directly or remotely. If a landlord lets his premises to another in a populous neighborhood, to be used for a slaughter-house or other noxious trade, he is jointly liable with the tenant, both civilly and criminally, for the consequences thereof. Why then is he not equally liable as a keeper of a bawdy house, when he lets his premises for that purpose, and thereby creates a nuisance? He clearly is, both upon principle and authority.²

SEC. 32. It has sometimes been thought by people in some sections of the country, that nuisances of this character can be abated by the acts of persons living in their vicinity, and offended thereby as much as any other. But this is a serious mistake. No nuisance, whose effect is merely moral, can be abated except by the

¹ *Commonwealth v. Gillespie*, 7 S. & R. (Penn.) 469; *Rex v. Dixon*, 3 M. & S. 11; *Rex v. Medley*, 6 Car. & P. 292; *Regina v. Same*, 6 C. & P. 298.

² *Pedley's Case*, 1 Ad. & E. 822; 28 Eng. Com. Law, 220; *Commonwealth v. Park*, 1 Gray (Mass.), 553; *Commonwealth v. Mayor*, 6 Dana (Ky.), 293.

courts, and by the courts only, by the administration of such punishment as will be likely to cause the parties to desist. It is very laudable on the part of the people, in any community, to desire to be rid of these moral pests, and the indignation experienced by them at the presence of such institutions in their midst is just; but they will not be justified in attempting to check the evil by any riotous or unlawful means. The courts are always ready to punish the offense, and individuals will not be justified either in tearing down, assaulting, or in any manner injuring the house or demolishing the furniture, or assaulting the inmates thereof, or doing any other unlawful acts.

In the case of *Ely v. The Supervisors of Niagara Co.*, 36 N. Y. 297, the court of appeals considered this very question. In that case, the houses of the plaintiff's assignee (one Maria Moody) were destroyed by fire set by a mob, and, upon the trial of the suit, which was against the supervisors of the county for not protecting the property, the defendants offered to show that the assignor kept the houses in question as bawdy houses, and resorts for thieves and murderers, and that she, by her own acts in keeping said houses, excited the hostility that resulted in their destruction. The court excluded the evidence, and the defendants took the case to the *Court of Appeals* upon that question, and SCRUGHAM, J., in delivering the opinion of the court, said: "To keep a bawdy house and place of rendezvous for thieves and murderers is criminal wickedness; but considered only in reference to the safety of the house and furniture, it cannot be regarded as carelessness and negligence. A house kept as a house of ill-fame, and as a resort for thieves and other disreputable persons, is a public and common nuisance, but the destruction of the building and its furniture is not necessary to its abatement, and is unlawful. The property of the plaintiff was not put beyond the pale of the law's protection by her detestable and criminal conduct. She still had a right to expect and to rely implicitly upon the zeal and ability of the proper officers, to defend her house and furniture against the unlawful effects of any public indignation her evil practices might provoke."

SEC. 33. The reason for this rule is apparent. The law will only permit the abatement of so much of a nuisance as is necessary to prevent the injury. In all instances of tangible injury, there is usually no difficulty in arriving at the cause and removing it. But with intangible injuries, such as are dependent upon, and arise from the acts of persons, solely, a legal tribunal alone can correct the wrong. The buildings in which these practices are perpetrated are only temporarily devoted to such purposes; they need only to be rid of the persons who use them, and cease to operate injuriously to the public when this is accomplished; and as the courts have ample power to correct the evil, individuals have no right, under any circumstances, to interfere to abate the evils, except by a resort to the courts. This is also the rule with every nuisance that is merely immoral in its effects.¹

SEC. 34. The reason why houses of ill-fame are regarded as public nuisances is thus given by HAWKINS: "First, because they draw together crowds of dissolute and debauched persons, thereby endangering the public peace; and, second, because of their tendency to corrupt the manners of both sexes by such an open profession of lewdness." A married woman is as liable for this offense as a *femme sole*, for the offense is only for the keeping of the house, and the wife is generally regarded as having control of the internal affairs and government of the household. She is liable, even though she keeps the house by the express command of her husband.

SEC. 35. In *Rex v. Williams*, tried at the M. T., 1710, K. B., 1 Salk. 384, which was an indictment against Williams and his

¹ In *Brown v. Perkins*, 12 Gray (Mass.) 89, which was an action for damages sustained by reason of the defendants entering the store of the plaintiff where liquors were kept for sale, and destroying the liquors. The defendants justified, upon the ground that the shop and the liquors were a common nuisance, but the court held that nuisances of this kind, whose effects are intangible, cannot be abated by the acts of parties, even when aggrieved thereby. *Gray v. Ayres*, 7 Dana (Ky.) 375; *Moody v. Supervisors*, 46 Barb. (N. Y. Sup. Ct.)

659. In *Welch v. Stowell*, 2 Douglas (Mich.) 332, it was held, that individuals have not a right to abate a nuisance resulting from the keeping of a bawdy house by demolishing the building or otherwise interfering therewith; that the remedy is by indictment. In *Barclay v. Commonwealth*, 25 Penn. St. 503, it was held, that where the nuisance arises from the wrongful use of a building, the remedy is to stop the use, not to tear down or demolish the building.

wife for keeping a house of ill-fame, the respondents moved to quash the indictment, upon the ground that the wife living with her husband could not be said to keep the house any more than a servant employed therein could be. But the court overruled the motion, and held "that the wife may be guilty of and commit a crime with the husband, and that the crime is joint and several. A husband and wife may commit a crime jointly, and be jointly and severally punished therefor, as murder, treason, etc. Keeping a bawdy house is a common nuisance, and the indictment for keeping is a charge against them for this nuisance. The keeping is not to be understood of having or renting in point of property, for in that sense the wife cannot keep it; but the keeping is in the government and management of the house in such a disorderly manner as to be a nuisance; and the wife may have a share in the management of a disorderly house as well as the husband."

SEC. 36. It has also been held, that a woman occupying a single room in a house as lodger, who allows her room to be occupied by others for the purposes of prostitution, may be chargeable with keeping a bawdy house, as much as though she used the whole house for that purpose. But it would seem that mere solicitation of chastity is not indictable. Neither can a woman be indicted for keeping a bawdy house, merely because she is unchaste, and admits one or many persons to her room to have illicit intercourse with herself. Thus, in *Regina v. Pierson*, 1 Salk. 382; 2 Ld. Raym. 1192, it was held, "that an indictment will lie against a lodger in a house occupying but one room for keeping a bawdy house, if she there accommodates and entertains people in the way of a bawdy house. It would be keeping a bawdy house as much as though she had the whole house; but a base solicitation of chastity is not indictable." A female boarder in a house of that character cannot be held chargeable for keeping a house, even though she has a separate room allotted to her where she plies her vocation. The keeper of a house of this character is the person who has the direction and control of its government and affairs. A person occupying a single room in a house over which they have control, and of which they have the management,

without being answerable to, or under the control of any other person, is just as much the keeper of a house as though their authority extended to the whole building; for as to them the room is just as much their "castle," in the legal sense, as though it was a whole house, and they have the same rights therein. An officer, entering the house to levy execution, would have no more right to break open the door of the room than he would to break the outer door of the house.

DISORDERLY HOUSES.

SEC. 37. So, too, a disorderly house is a common nuisance, and while bawdy houses legitimately come under this head, yet it embraces a large class of other houses, kept for entirely different purposes, and to constitute which prostitution need not be an element.

SEC. 38. A disorderly house is any place of public resort in which unlawful practices are habitually carried on, or which becomes a rendezvous or place of resort for thieves, drunkards, prostitutes, or other idle, vicious and disorderly persons, who gather there to gratify their depraved appetites, or for any purpose;¹ for such persons are regarded as dangerous to the peace and welfare of the community, and their presence at any place in considerable numbers is always a just cause of alarm and apprehension.² A place where intoxicating liquors is sold contrary to law is a disorderly house, or where any acts punishable by fine are habitually carried on;³ and a place where liquor is sold under a license in excessive quantities, whereby persons become intoxicated, and where frequent brawls result therefrom, is a disorderly house, and indictable as a nuisance; for no person has a right to carry on upon his own premises or elsewhere, for his own gain or amusement, any public business clearly calculated to injure and

¹ *State v. Williams*, 30 N. J. 102; *James Butler's Case*, 1 City Hall Recorder (N. Y.), 66; *Mary Rathbone's Case*, id. 26.

² *State v. Hand*, 7 Clark (Iowa), 411; *Commonwealth v. Howe*, 13 Gray (Mass.), 26; *Commonwealth v. Hart*, 9 id. 465.

³ *Commonwealth v. Stewart*, 1 S. & R. (Pa.) 342; *State v. Bailey*, 1 Fost. (N. H.)

343; *Commonwealth v. Ashley*, 2 Gray (Mass.), 356; *United States v. Columbus*, 5 Cranch C. C. 304; *United States v. Prout*, 1 id. 203; *United States v. Coulton*, id. 206; *United States v. Lindsay*, id. 245; *United States v. Gray*, 2 id. 341; but see *United States v. Nailor*, 4 id. 372; *United States v. Squagh*, 1 id. 174.

destroy public morals, or to disturb the public peace. And while a license to sell liquors will protect a person from prosecution for such sales, it will not protect him from prosecution for an abuse of the authority given him, whereby he creates a nuisance.

SEC. 39. Noise and violence are not necessary elements to constitute a disorderly house. It is sufficient to show a place illy governed and regulated in the sense before stated. It is enough to show that the practices indulged in are unlawful, and destructive of public morals or of the public peace, or dangerous to the lives or property of a community.¹

SEC. 40. Not only is the person keeping the house liable to indictment therefor, but the owner thereof, if he rents it knowing

¹ *People v. Wood*, 9 Parker's Crim. Rep. 144. In *United States v. Columbus*, 5 Cranch C. C. 305, CRANCH, C. J., charged the jury thus: "If you believe from the evidence that the respondent kept a public and open shop in this city, in which he sold liquors to persons not lodgers or boarders at his house, at times to persons who were drunk, at times to persons who came in drunk, and drank there and went out drunk, to persons who came out and went away from his house in a noisy manner, and went sky-larking in the streets, and that he had no license for keeping a public house, then you will find him guilty of keeping a disorderly house, as charged in the indictment." In *People v. Baldwin and wife*, 1 Crim. Rec. (N. Y.) 279, the respondent Baldwin was the proprietor and manager of the City Theater in New York city; his wife assisted in the management thereof. It appeared on the trial that great noise proceeded therefrom, annoying the neighborhood, and that young lads assembled about the doors, using profane language and making a great noise; that the applause inside the theater was very boisterous, disturbing the rest of those living in the vicinity. The husband was convicted of keeping a disorderly house and the wife was discharged. In *The People v. Rowland*, 1 Crim. Rec. (N. Y.) 286, it was held the house need not be noisy to constitute a disorderly house; the court said: "It is not necessary that the public peace of the neighborhood should

be disturbed; it is enough if it is resorted to for any immoral purpose." In this case, it was proved that men and boys and young girls assembled there to drink and tittle. In *The People v. Clark*, 1 Crim. Rec. (N. Y.) 288, the respondent kept a place resorted to by young boys, thieves and rogues: held, a disorderly house. In *State v. Buckley*, 5 Harr. (Del.) 508, respondent kept a store and sold liquor under license, and permitted persons to collect there in crowds on sidewalk and in front of the store, who, under the influence of liquor obtained there, were noisy and riotous, and disturbed the public by profane cursing and swearing, and other offenses. See *State v. Hackney*, 8 Ired. 494; *State v. Smith*, 6 Gill. 425. A concert saloon, where men and women are allowed to come together for improper purposes, is a disorderly house. So any place where there is public music and dancing that annoys and disturbs the neighborhood is a disorderly house. *Gregory v. Tafts*, 6 C. & P. 271; 15 Eng. Com. Law, 393-397; *Gregory v. Taverner*, 6 C. & P. 280. In *Bloomhuff v. State*, 8 Blackf. (Ind.) 205, it was held, that any illy-governed and disorderly room, wherein disorderly persons were suffered to meet and remain by day and night drinking, tippling, cursing, swearing, or quarreling or making great noises, is a disorderly house, and indictable as such. In this case, the nuisance complained of was a bowling alley. *Barnescotta v. People*, 10 Hun (N. Y.), 137; *Jacobowsky v. People*, 6 id. 524, *affd.* by Court of Appeals.

the purpose for which it is to be kept, is equally liable.¹ So, also, if after ascertaining the nature of the business carried on there, and having the power to prevent it, as by refusing to extend the lease, or if he actively advises the keeping or assists therein, or gives his consent thereto, he is liable.² But his approbation or consent are not to be inferred. They must be proved by positive acts or declarations, that show that he knew the improper uses to which the premises are devoted, and approved thereof. The fact that he has the power to eject, and fails to exercise it, is not sufficient, and would not warrant a conviction.³ But a renewal of the lease, knowing what purposes the premises had been devoted to, would be sufficient to charge him.⁴

HOUSE OF ASSIGNATION.

SEC. 41. A house of assignation, where parties meet for the purpose of prostitution, is a disorderly house, although no prostitutes are kept there. It is as much a violation of the laws of decency and morality, and is as disastrous in its consequences to society as a bawdy house, and tends as essentially to the destruction of public morals and the promotion of dissolute habits. This was held in *People v. Rowlands*, 1 Wheeler's Crim. Cas. (N. Y.) 286; and, also, see *Regina v. Pierson*, 1 Salk. 282.

In *State v. Bailey*, 1 Fost. (N. H.) 343, it was held, that in an indictment for keeping a disorderly house, it is not necessary to allege that it is kept for lucre or gain. But in *Jennings v. Commonwealth*, 17 Pick. (26 Mass.) 177, a different doctrine is held. But being *per se* a common nuisance, if it is laid in the indictment *to the common nuisance of the public*, it would seem to be immaterial whether it is kept for profit and gain or not, and it is so held in *Commonwealth v. Ashley*, 2 Gray (Mass.), 256. The effects upon the community are the same in the one case as the other, and the offense exists, and

¹ *People v. Townsend*, 3 Hill (N. Y.), 479; *People v. Erwin*, 4 Denio (N. Y.), 127; *Commonwealth v. Moore*, 11 Cush. (Mass.) 400; *Brooks v. State*, 2 Yerg. 432.

² *State v. Abrahams*, 6 Iowa, 118.

³ *State v. Williams*, 30 N. J. 103, *Regina v. Stannard*, Leigh & C. 349.

⁴ *State v. Williams*, 30 N. J. 103; *Commonwealth v. Harrington*, 3 Pick. (Mass.) 26; *Smith v. State*, 6 Gill. 425; *United States v. Grav*, 2 Cranch C. C. 788.

it is so held in *Hunter v. Commonwealth*, 2 Serg. & Rawle (Penn.), 298.¹

TIPPLING HOUSE.

SEC. 42. A common tippling house is a disorderly house where people are allowed to congregate and drink liquors, and to remain upon the premises behaving in a disorderly manner to the annoyance of the neighborhood.² But proof of a single instance of disorderly conduct or disturbance is not sufficient. It must be habitual.³ So, too, a house at which the keeper allows people of ill-fame and name to congregate and remain, drinking, tippling and misbehaving themselves to the annoyance of the public, is a disorderly house and punishable as such at common law, and when laid in the indictment as being a common nuisance, it is not necessary to allege that it was kept for profit or gain.⁴

PLACES OF AMUSEMENT KEPT FOR GAIN.

SEC. 43. In *Tanner v. Trustees*, 5 Hill, 121, the court held that a bowling alley or any place of amusement kept for hire that serves no useful end is a public nuisance, and as this is a leading case, and one that is often referred to and relied upon by courts when dealing with nuisances of that character, I have deemed it advisable to give the opinion of Judge COWEN in full. The action was brought by the trustees of the village of Batavia to recover a penalty of five dollars imposed by the terms of a by-law of the village. The village charter contained a section authorizing the village to pass by-laws, among other things,

¹ In *Regina v. Rice et al.*, Weekly Notes (Eng.), 1866, p. 28, the defendants kept a house to which prostitutes resorted with men for the purposes of prostitution, and rented rooms for that purpose. It was held, that the respondents were properly convicted of keeping a disorderly house, although no disorderly conduct other than that, and no noise or violence were shown to have transpired there.

² *State v. Bailey*, 1 Foster, supra; *Clementine v. State*, 14 Miss. 113; *State v. Stevens*, 40 Me. 559; *State v. Hackney*, 8 Ind. 494; *Dunnaway v. State*, 9 Yerg. (N. C.) 350.

³ *State v. Boyce*, 10 Ired. (N. C.) 536; *United States v. Columbus*, 5 Cranch C. C. (U. S.) 304; *Commonwealth v. Hunter*, 2 S. & R. (Penn.) 298; *People v. Rowlands*, Crim. Rec. (N. Y.) 286; *People v. Clark*, 2 N. Y. 285; *State v. Buckley*, 5 Harring. (Del.) 508; *State v. Hackney*, 8 Ired. (N. C.) 494.

⁴ *Commonwealth v. Stewart*, 1 S. & R. (Penn.) 842; *Smith v. Commonwealth*, 6 B. Monr. (Ky.) 22; *Bloomhuff v. State*, 8 Blackf. (Ind.) 475; *People v. Baldwin*, Criminal Recorder (N. Y.), 286; *State v. Brickley*, 5 Harring. (Del.) 508; *People v. Rowlands*, Criminal Recorder (N. Y.), 286.

relative to nuisances within the village limits. The village, by a by-law, provided that if any person should keep or maintain a ball-alley, the person so offending should be punished by a fine of five dollars. The defendant insisted that a bowling alley was not a nuisance when kept in a proper manner, and that his alley was kept in a proper manner. There was no evidence in the case to show that gaming was ever practiced there, or that disorderly or vicious persons congregated there, or that the noise of the alley disturbed the neighborhood. The question was decided upon the single point, whether such places of amusement, serving no useful end, were *per se* common nuisances.

COWEN, J., in delivering the opinion of the court, said: "This case has been argued mainly on the general words at the conclusion of the village charter. So far as the arguments go, on these they need not be considered, for I am of the opinion that the offense prohibited is within the more particular words. Among other things, the trustees are authorized by that section to make by-laws relative to slaughter-houses and nuisances generally. The by-law in question provides that it shall not be lawful for any person to keep or maintain any ball-alley or apparatus, alleys, machine, building or inclosure, constructed for the purpose of playing thereon or therewith at the game called or known by the name of nine-pins or ten-pins, for gain, hire, reward or emolument of any kind, or in any manner whatsoever. Establishments of this kind in populous communities are at best, and even when used without hire, very noisy, and have a tendency to collect idle people together and detain them from their business. When built and kept on foot for gain, the owner is interested to invite and procure as full an attendance as possible day after day; and for this purpose temptations beyond mere amusement are often resorted to, such as drinking and gaming. So far as I have been able to discover erections of every kind adapted to sports and amusements having no useful end, and notoriously fitted up and continued with a view to make a profit for the owner are regarded in the books as nuisances. Not that the law discourages innocent relaxation, but because it has become matter of general observation, that when gainful establishments are allowed for their promotion, such establishments are usually per-

verted into nurseries of vice and crime. Common stages for rope dancers have been adjudged nuisances at the common law. "Not only," says HAWKINS, "because they are great temptations to idleness, but because they are apt to draw together great numbers of disorderly persons which can but be an inconvenience to the neighborhood." In the next section he distinguishes between places kept for such useless sports, and play-houses that were originally introduced for the laudable design of recommending virtue to the imitation of the people and exposing vice and folly. These, he says, are not nuisances in their own nature, but may only become such by accident; whereas the others cannot but be nuisances. I mention common stages for rope dancing because bowling alleys were long since held to stand on the same footing. *Jacob Hall's Case*, 1 Mod. 76. Hall, a rope dancer, had erected a stage, or was about erecting one, at Charing Cross, which the court of king's bench pronounced to be a nuisance. HALE, Ch. J., mentioned as a precedent: "That in the eighth year of Charles the First, Noy came into court and prayed a writ to prohibit a bowling alley erected near St. Dunstan's church and had it." In the report of this case in 2 K. & C. 846, Ch. J. HALE is represented as saying that "Noy prayed a writ to prohibit a bowling alley and had it without any presentment at all." Thus we see that HAWKINS is sustained by the highest authority in saying that such places cannot but be nuisances. The tendency of the alley being well known it was adjudged to be a nuisance of itself, and a writ accordingly issued to remove it without any trial. Now this is not because rope dancing or playing at nine-pins or any other game with bowls is a mischief; nor that being a spectator at a rope dance is censurable in the least. Such acts are not nuisances. In themselves they are entirely innocent. The nuisance consists in the common and gainful establishment for the purpose of sports, having the aptitude and tendency of which HAWKINS speaks. Not that this always produces the consequences of which he complains, but because there is imminent danger of its doing so. A deposit of gunpowder, a useful article, among a block of houses might be very harmless, yet it is a public nuisance from the danger of explosion. Anon., 12 Modern Rep. 342. The case of the *People v. Sergeant*, 8 Cow.

139, is relied on, which held that a room kept for the playing of billiards was not a public nuisance, though a profit was made of it. But the court disavows the intent to interfere with the principle laid down by HAWKINS. On the contrary, they refer to it with approbation, and admit that the keeping of a gaming house was an indictable offense at common law. This was held expressly in *Rex v. Dixon*, 10 Mod. 335. Yet the act of gaming was no more criminal than dancing on a rope or playing at cricket. It may be somewhat difficult to reconcile the *People v. Sergeant*, with the general principle which seems perfectly well settled; but the case claims no more than that a billiard room kept in a particular way forms an exception. In general the law is not scrupulous about actual results. It sees that a building has been rented for an idle purpose, the probable consequences of which will be pernicious. It does not stop, therefore, and call witnesses to prove that it is so in fact. When Hall, the rope dancer, was brought up, Lord HALE held that it was enough that the stage had been or was about to be erected. He told him he understood it was a nuisance to the parish. It is true that some of the inhabitants, being present, said it occasioned broils and fightings, and drew so many rogues to the place that they lost things out of their shops every afternoon. But this information was not received as from witnesses. No one could, on his oath, connect the cause with the effects, and no one appears to have been sworn. All the evils complained of might have existed without the stage. Had the erection been for the purpose of some useful business or object, actual consequences would have been inquired of. But it was the simple case of one man squandering his time for money, in order to induce others to waste both their time and money. No one is so blind as not to see that such places, on their becoming known, bring together the most profligate mixtures; brawlers, drunkards, gamblers, blacklegs, pickpockets, petty thieves. Lord HALE did not want witnesses of this. All he wanted was of the notoriety of the fact—the testimony of experience. According to the report of *Hall's Case*, 2 Keb., there were mere affidavits that Hall was going on to build his booth, which was not yet done. The reporter adds that, after the court was informed of the working,

they sent for Hall and the workmen by a tip-staff, "and because he would not enter into a recognizance not to build on, they committed him and then he ceased." VENTRIS gives the same account of the matter. (Vent. 169.) He says that the complaint was that the booth was erecting, and that Hall intended to show his feats of activity to the annoyance of the complainants, "by reason of the crowd of idle and naughty people that would be drawn thither, and their apprentices inveigled from their shops." The court ordered him to stop; to which he replied, with great impudence, "that he had the king's warrant for it and promise to bear him harmless." After committing him, the court ordered a record to be made of the nuisance, as upon their own view, and awarded a writ to the sheriff to prostrate it. All this is only following out the rule of law that a man shall be answerable for all the probable consequences of his acts; the obvious ground on which the court proceeded a few years before in the case of a bowling alley, without even waiting for a presentment. In *Rex v. Moore*, 3 B. & A. 184, the defendant was convicted on the ground that he had collected a crowd in his own field for pigeon shooting, by which the neighborhood was annoyed; and he was held guilty of a nuisance. LITTLEDALE, J., said: "No doubt it was not his object to create a nuisance, but if it be the probable consequence of his act, he is answerable as if it were his actual object. If the experience of mankind will lead any one to expect the result, he is answerable for it." In *Rex v. Howell*, 3 Keb. 465, the court thought an indictment for a nuisance in keeping a cock-pit valid at common law; and this again on the authority of the bowling alley case, which they mentioned, and said that it was pulled down as a common nuisance. In *Rex v. Dixon*, the indictment was simply for keeping a common gaming house. No consequences were mentioned, and it did not conclude, "*ad commune nocumentum*." It was therefore insisted that it could not be good at common law. The court answered that it was not necessary, because the offense was a nuisance in its own nature.

In the case before us, the rules of playing in Tanner's ball alley are stated, with an instance of play by a person who hired the alley, and proceeded under the inspection and reckoning of

Tanner. I have gone into a consideration of the cases, that a building which the law considers a nuisance in its own nature, when kept in a particular way and for a particular purpose, is not to be tested by appearances. It cannot be modified by printed rules against the practice of gambling, and by the surveillance of the owner as if to see that they are not violated. The law knows that appearances are often simulated. Vicious houses often make loud pretensions to such superior regularity, that, however others may behave, they would be thought an exception. In the case of the *ball alley* mentioned by Lord HALE, the court did not send and inquire what appearances of regularity and decency might be affected by the owner. Information that it was a bowling alley satisfied them, and they issued a writ to abate it without waiting for a trial. Their own sagacity spoke as to the ultimate effects. If the building had been so far well conducted, so much the better for the community. The court determined that it should not afterward be conducted at all, on account of the consequences that would probably ensue. Suppose a woman to hold out her house as one of ill-fame, does it take from it the character of a nuisance that there has been no instance of actual prostitution? Or, on trying it under indictment, would it be necessary to show a case of prostitution? The law applies as we have seen the "*presumptis juris et de jure*." A man who should erect a pig-sty under his neighbor's window could hardly excuse himself by showing that he intended to keep it clean and inoffensive, although the thing is useful in itself. House in a populous town, divided for poor people to inhabit during the prevalence of an infectious disease, is a nuisance. 1 Rolle's Abr. 139. The law does not wait for the disease to spread. It exercises a wise forecast, and arrests the evil at the threshold. It does the same thing in favor of public morals and economy. A useless establishment, wasting the time of the owner, tending to fasten his own idle habits on his family, and to draw the men and boys of the neighborhood into a bad moral atmosphere, a place which in despite of every care will be attended by profligates with evil communication, and at best with a waste of time and money, followed by a multiplication of paupers and rogues, has always been considered an obvious nuisance. The only argument I have heard urged in excuse

for a bowling alley is, that the exercise of the players is conducive to health. In this respect such alleys have been compared to bath-houses. The answer is, that there are various other kinds of exercise entirely equivalent; and if not, the means of playing with bowls are easily accessible without those public establishments carried on for hire, which the law has denounced as of evil tendency. The playing with cards and dice have been recognized by grave authority as useful in recreating and fitting a person for business. Bacon's Abr., Gaming, *A*. Yet it would scarcely be contended that a card-room kept for reward, under the strongest protestations that it was intended solely for recreation, should be tolerated by law. The pernicious consequence of allowing men to have a pecuniary interest in that sort of play is too well known."

SEC. 44. The doctrine of this case is predicated upon a false basis, and is highly erroneous in principle. I doubt if a case can be found, ancient or modern, that goes to the extreme and unwarranted length that *it* does. The learned judge proceeded upon the ground that bowling alleys, and all other places of amusement kept for gain or hire," are "*malum in se*," and that no proof of their effects is necessary. That the court of its own mere motion may, by one sweeping exercise of power, declare the whole catalogue of amusements indulged in by mankind, and for the exercise of which a compensation is paid to the proprietor, public nuisances. This is carrying the power of courts to more extreme lengths than they went, even in the period of the world's history, when the most extreme despotism and bigotry prevailed. According to the learned judge's own showing, Lord HALE would not declare Jacob Hall's rope-dancing booth a nuisance upon the mere complaint of the persons living in the vicinity; but, notwithstanding the fact that only the day before he had erected his booth at Lincoln's Inn Field, and had been prevented from showing his feats there by a writ of inhibition from Whitehall, he sent for Hall, and, on his appearing in court, did not tell him that his business was a nuisance, but that he *understood* it was a nuisance to the parish. Nor was he content with this, but took the evidence of people doing business and keeping shops in the vicinity of the booth, who stated that it called large crowds of

thieves and rogues to the vicinity, and that they had that day lost many things from their shops (1 Mod. 76; 2 Keble, 846), and it was upon this evidence, and not upon the mere motion of the court, that he declared the booth a nuisance, and ordered its prostration. I say it was upon this evidence, I mean according to the report of the cases in Keble and Modern, relied upon by the court. Now, so far as the authority of those two cases goes, there is no intimation that the court declared the booth a nuisance, or did any thing in reference to it, notwithstanding the evidence before it that it drew thieves and rogues to the place, and occasioned broils and fighting, and that frequent thefts had been committed in the vicinity. The report of the case is utterly silent as to the disposition of the case, so far as Hall or his booth is concerned; but they close by putting into the mouth of the learned judge a mass of senseless words, having no connection with or applicability to the case, to wit: Lord HALE said, that "in the reign of Charles I, Noy came into court and applied for a writ to prohibit a bowling alley near St. Dunstan's church, and had it;" and this is all that was said or done by the court, according to those reports in reference to the matter. It does not appear that Hall's booth was declared a nuisance, or that a writ of prohibition was issued.

Now, upon this senseless statement put into the mouth of the court by these two worthless reports, the learned judge felt warranted in holding that a bowling alley is a common nuisance at common law, and *malum in se*. Now, it is a matter well understood, that in the English courts the Modern reports have always been regarded as very doubtful authority, and that Keble's reports were in such bad repute, that for a long time they were not allowed to be used or referred to; and when we remember this, and find this same case of Hall's reported in *Ventris*, 169, in a sensible way, and in a manner so different from the reports in *Modern* and *Keble*, that, except for the name, we should not recognize them as the same case at all; and when we still further remember that *Ventris*' reports have always been in good repute, and that they were published in Lord HALE's time, and bear his unqualified indorsement and approval published therein, it must require a high degree of credulity on the part of a court to predicate an important principle upon the mass of senseless trash

in *Modern* and *Keble*, when no such statements appear in a report of the same case by a reporter who is known to have been correct, whose reports are indorsed by the court whose opinions he reports, and the cases reported by whom bear intrinsic evidence of their genuineness. If Lord HALE ever made the statement in reference to bowling alleys, attributed to him in *Modern* and *Keble*, it is certainly singular that we find no account of it anywhere else. Lord HALE himself afterward wrote his "*Historia Placitorum*," and not a word is said by him there in reference to the case, or in reference to bowling alleys being common nuisances. Noy, who was attorney-general in the reign of Charles I, was himself a reporter, and not a word about the circumstances of the prohibition of the bowling alley near St. Dunstan's church on his motion is to be found in his reports. *Hawkins*, who was an industrious author, and who is regarded as high authority, although he has an exhaustive chapter on nuisances in volume 1 of his *Pleas of the Crown*, fails to enumerate bowling alleys as in the interdicted list of amusements. In *Viner's Abr.*, *Bacon's Abr.*, *Petersdorff's Abr.*, *Russell on Crimes*, *Gibbons on Nuisances*, or any of the English works, we search in vain for any intimation that *any* court at *any* time, or under *any* circumstances, ever held, that bowling alleys were common nuisances; and the inference is irresistible, that they were never so regarded or held. But admit, for the purposes of the argument, that the court did say what it is reported as saying in *Modern* and *Keble*, what does it prove? Does it establish the doctrine of COWEN, J., that bowling alleys are public nuisances and *malum in se*, so that a court needs no evidence of their ill effects to declare them such? By no means; on the contrary, it simply establishes the fact that a bowling alley may be declared a nuisance when it is near a church, or when the manner in which it is conducted brings it within the rule. The reasonable presumption is, that if Noy had the writ to prostrate the bowling alley near St. Dunstan's church, he had it because it *was* near the church, and disturbed by its noise the worship there; and if Lord HALE used the words put in his mouth in *Modern* and by *Keble*, he doubtless referred to that as a precedent, to show that if the court regarded a bowling alley near a church as a nuisance, he would be justified in holding a

rope-dancer's booth near the king's palace, and which actually obstructed the highway, as a nuisance; and not because a bowling alley was regarded as of the same class with rope-dancers' booths. For a better understanding of the matter, and as illustrative of the utter baselessness of the foundation upon which Judge COWEN predicates his doctrine, I will give the cases as reported in the *Modern* reports and in *Keble*, and also by *Ventris*.

SEC. 45. *Jacob Hall's Case*, 1 Mod. R. 76; 2 Keble, 846: "One Jacob Hall, a rope-dancer, had erected a stage in Lincoln's Inn Fields, but, upon petition of the inhabitants, there was a writ of inhibition from Whitehall. Now, upon complaint to the judges that he had erected one at Charing Cross, he was sent for into court, and the CHIEF JUSTICE told him that he had heard it was a nuisance to the parish, and some of the inhabitants being present said it did occasion broils and fighting there, and drew rogues and thieves to the place, and that they lost things out of their shops every afternoon. And HALE said, in Car. I, "Noy came into court and prayed a writ to prohibit a bowling alley near St. Dunstan's church, and had it."

This is all there is of the case in the two reports. It must be confessed that this report is rather poor authority upon which to predicate a doctrine so sweeping and extensive in its consequences as that laid down in *Tanner v. Trustees, etc.* The following is a copy of the case, as it appears in *Ventris*.

SEC. 46. *Jacob Hall's Case*, *Ventris*, 169: "Complaint was made to the LORD CHIEF JUSTICE by divers of the inhabitants about Charing Cross, that Jacob Hall was erecting a great booth in the street there, intending to show the feats of activity and dancing upon the ropes there, to their great annoyance, by reason of the crowd of idle and naughty people that would be drawn thither, and their apprentices would be inveigled from their shops. Upon this the chief justice appointed him to be sent for in the court, and that an indictment should be presented to the grand jury of this matter, and withal the court warned him that he should proceed no further. But, he being dismissed, they were presently after informed that he caused his workmen to go on, whereupon they commanded the marshal to fetch him into court; and being

brought in and demanded how he durst go on in contempt of the court, he, with great impudence, affirmed that 'he had the king's warrant for it, and promise to bear him harmless.' Then they required of him a recognizance of £300 that he should cease further building, which he obstinately refused, and was committed. And the court caused a record to be made of this nuisance as upon their own view (it being on their way to Westminster), and awarded a writ thereupon to the sheriff of Middlesex, commanding him to prostrate the building; and the court said: 'Things of this nature ought not to be placed among peoples' habitations, and that it was a nuisance to the king's royal palace; besides, that it straitened the way and was insufferable in that respect.' "

SEC. 47. Now, which of these reports seems to bear intrinsically the best evidence of being a true and faithful report of the proceedings of the court in this case? In the report of the case from the Modern reports and Keble, it does not appear that any thing was done by the court in reference to the complaint of the people, except to induce Lord HALE to utter a senseless and meaningless expression, without any sort of force or application to the case in hand. In the report from Ventris, we have a full and complete history of the case from the beginning to the end, and evincing the best evidence of its genuineness from the fact that every movement in the case was characterized by that prudence and cautious regard for men's rights, and that degree of temperate mercy that was always exhibited by that eminent judge (Lord HALE), as well as the unflinching firmness with which he administered the law to wrong-doers when they exhibited no disposition to refrain. From the latter report of the case, it appears that the court had abundant reasons for declaring the booth a nuisance: First, because it collected a crowd of idle and naughty people to the vicinity, and called apprentices from their work; and, second, because it was so near the king's palace as to be a nuisance to that, and because it was erected in the street and straitened the way. The court did not, upon the evidence before it, order the prostration of the building, but ordered the grand jury to find an indictment, in order that the question might be tried by jury, and dismissed Hall from the court with a warning

not to go on with his show; but, he disregarding their caution, the court viewed the nuisance, and upon their own view ordered its removal. It is evident from either of the reports, that Lord HALE had abundant evidence before him of the deleterious and annoying character of Hall's avocation to justify him in directing the destruction of his booth, and declaring, as he afterward did in *Rex v. Batterson*, 5 Mod. 142, that the business of a rope-dancer is a nuisance *in se*. But I cannot concur with Judge COWEN, in *Tanner v. Trustees*, *ante*, that any of the cases cited by him in any measure justified the court in holding that a bowling alley is *per se* a public nuisance, or has been so regarded at common law; nor can I, without doing violence to the plain and palpable rules that have been established by the courts in all periods of the world's history, agree that the facts in the case justified the court in declaring the bowling alley in question a nuisance. There was an entire absence of every element necessary to bring it within the rule. There was no proof that it disturbed the neighborhood by its noise; that crowds of idle and vicious people congregated there; that gaming was ever allowed, or that any of the elements existed that were requisite to constitute it a nuisance, or that such a condition of things had ever resulted from a bowling alley in any place or at any time; and I feel compelled to say that, in my judgment, it was an unwarrantable exercise of power, and such as is not in any measure sustained by authority, or as should commend itself to other courts as a precedent. The doctrine of this case was seriously questioned in the case of *Updike v. Campbell*, 4 E. D. Smith's C. P. (N. Y.) 570, by WOODRUFF, J., and is ably reviewed and controverted by BEASLEY, Ch. J., in *State v. Hall*, 32 N. J. 162, and was not so far regarded as good authority in *State v. Haines*, 30 Me. 65, that the court felt justified in holding a bowling alley a nuisance without some of the concomitants that have usually been regarded as the essential elements of a nuisance.

SEC. 48. In *People v. Sargeant*, 8 Cow. (N. Y.) 169, the court held, that a billiard room not being a nuisance at common law, is not nuisance when conducted in an orderly manner, without noise or gaming. It is said by the court that the game is one that requires

the exercise of the highest skill, and from this fact I presume the court inferred that it would not be likely to attract the idle and vicious, and produce those ill results upon society that are essential in order to constitute such places public nuisances. It cannot be denied that, notwithstanding the comments of Judge COWEN upon the doctrine of this case, in *Tanner v. Trustees, etc.*, the court pursued the usual course in such cases, and literally followed the precedent established by the English courts. Billiard rooms never having been declared nuisances, it would have been an exercise of power on the part of the court, that would have been wholly unwarranted by any precedent, to have declared the room a nuisance, without proof of the manner in which it was conducted, and some reliable idea of the probable results of its existence.

GAMING HOUSES.

SEC. 49. Gaming houses are common nuisances, and punishable criminally at common law, and the reason therefor, as given by HAWKINS, is, that they are detrimental to the public, in that they promote cheating and other corrupt practices, and incite to idleness and avaricious ways of gaining property. *Rex v. Dixon*, 10 Mod. 336; 1 Hawkins' P. C. 1586; Bacon's Abr., vol. 7, Nuisances, *a*; Russell on Crimes, vol. 2, p. 277. In *Rex v. Regina*, 1 B. & C. 272, it was held, that the keeping of a common gaming house for lucre and gain, and unlawfully causing idle and evil-disposed persons to frequent the place to play together for large sums at a game called "*rouge et noir*," is an indictable offense at common law, and HOLROYD, J., said, that "in his opinion it would be merely sufficient to allege in the indictment that the defendant kept a common gaming house, without setting forth particularly the nature or kind of game played;" and the same was also held in *Rex v. Taylor*, 3 B. & C. 502, but the better practice, as well as the most safe one, would be to set forth the kind of games played there. As to what constitutes a gaming house, within the legal meaning of the term, the rule was laid down in *Blewett v. State*, 34 Miss. 606, thus: "Gaming implies loss or gain by betting between parties, such as excites a spirit of cupidity;" and in Lewis' U. S. Crim. Law, 341, 343, 344, and in Waterman's

Archbold, 609, 610, 611, the same rule is given. It was also held, in the same case, that playing the "rub," as it is called, to see who shall pay the expenses of a game of billiards, is not gaming within the rule. The same was also held in *People v. Sargent*, 8 Cow. 169. But if a party plays at any game for stakes of money or other property directly, it is gaming.¹

SEC. 50. It is also held that a married woman may be indicted for the offense. *Rex v. Dixon*, 10 Mod. 335; 1 Hawkins' P. C. 92, § 30; 1 Hawkins' Abr., vol. 1, tit. Nui., A. Indeed, it is held that, in cases of all inferior misdemeanors, the wife may be indicted jointly with her husband; particularly where the offense is one that can be essentially aided by her intrigues, and where it does not appear that she was acting under the coercion of her husband. In *Rex v. Dixon*, 10 Mod. 335, the husband and wife were jointly indicted for keeping a common gaming house, and in *Rex v. Williams*, 10 Mod. 63, the husband and wife were joined in an indictment for keeping a bawdy house, and in both cases the court held that the offense was well laid. In Russell on Crimes, 16, the learned author lays down the same rule as well established.

COCK-PITS.

A cock-pit is a common nuisance, and not only indictable at common law, but it is considered as a gaming house within the Stat. 33 Hen. 8, c. 9, 311, which imposes a penalty of forty shillings a day upon such houses; and in *Rex v. Howell*, 3 Keble, 510, it was held, that upon conviction of the offense at common

¹ In *Estes v. State*, it was held, that a single act of gaming, unaccompanied with circumstances of aggravation, is not such a misdemeanor as will authorize a court to require sureties for good behavior. In *State v. Doom*, Charlt. 1, it was held, that a house in which a faro table is kept, for the purposes of common gambling, is *per se* a nuisance, and that evidence of frequent affrays and disturbances committed there is not necessary. Also, see *Rex v. Dixon*, 10 Mod. 336; 1 Bacon's Abr., tit. Nuisances; 1 Hawkins' P. C. (S. C.) 76. In *People v. Jackson*, 3 Denio (N. Y.), 101, it was held, that an indictment

setting forth that the defendant kept a common gaming house, without setting forth what was done there, would not be sufficient. In *Vanderwerker v. State*, 13 Ark. 700; *United States v. Ringgold*, 5 Cranch C. C. 378, and in *United States v. Milburn*, 5 Cranch C. C. 390, it was held not necessary to set forth the kind of game played; but it will always be the better practice to do so. In *James Butler's Case*, 1 City Hall Recorder (N. Y.), 66, it was held, that an inn, at which people were allowed to play for money, is punishable as a disorderly house.

law, the court would adopt this as the measure of the punishment.

INNS.

SEC. 51. Everyone at common law is entitled to keep an inn, and may be indicted and fined for keeping a public nuisance if he usually harbors thieves or suffers frequent disorders in his house. So, too; if he takes exorbitant prices, or if he refuses to receive a traveler as a guest into his house, or to find him food upon the tender of a reasonable price. 1 Hawkins' P. C. 78, §§ 1, 2. It has also been held, that the setting up of a new inn where there is no necessity for it, as when there are already a sufficient number, renders the inn so set up liable to indictment as a public nuisance. 1 Russell on Crimes; 3 Bacon's Abr., tit. Inns.

COLLECTING CROWDS.

SEC. 52. So, too, at common law the calling together of a large crowd for pigeon shooting, to the disturbance and endangering of the peace of the neighborhood, was regarded as a nuisance and punished as such. In the case of *Rea v. Moore*, 3 B. & Ad. 184, the defendant kept an inclosed lot near a highway for the purpose of allowing persons to practice at rifle shooting, by shooting at marks and at pigeons; and as a consequence large numbers of people frequented the place for those purposes, many of whom were idle and disorderly persons, armed with fire-arms, and by their noise and conduct disturbed the king's subjects, and put them in peril. It was held that he was chargeable for a nuisance.¹ In fact it may be said that any business or act which

¹ In *Bostock v. North Staffordshire R. R. Co.* the court restrained the defendants from holding a regatta near the plaintiff's premises, on the ground that the calling together of a crowd in the vicinity of her house and grounds was a serious annoyance to the inmates of the house, and exposed her property to damage. In *Walker v. Brewster*, 5 L. R. Eq. 25, it was held, that the collection of a crowd of noisy and disorderly people, to the annoyance of the neighborhood, outside the grounds in which entertainments with music and fire-works are given, is a nuisance, and that it makes no difference that he

has excluded all improper characters from the grounds, and the amusements within the ground have been conducted in an orderly manner. The collection of such a crowd in the vicinity of dwellings or places of business for no useful end, being a nuisance *per se*. *Inchbald v. Robinson*, 4 L. R. Ch. Ap. 388; *Cramp v. Lambert*, 3 L. R. Eq. 409. In *Morristown v. Mayer*, 67 Penn. St. 471, it was held, that loungers in the street are nuisances, and may be indicted as such. Russell on Crimes, p. 303; 2 Burn's Justice, Gaming III; 1 Hawkins' P. C. 364.

calls together a large crowd of disorderly people in a public place to the disturbance of the neighborhood, and where people are put in peril either of their persons or property, or whereby the public are seriously annoyed is a nuisance.¹ In *Commonwealth v. Millman*, 13 Serg. & Rawle (Penn.), 403, it was held that a constable who obstructed a highway by the collection of a crowd in the sale of goods taken in execution is indictable for a nuisance, and the same was also held in *Commonwealth v. Passmore*, 1 Serg. & Rawle (Penn.), 40.

In *Rex v. Carlisle*, 6 C. & P. 324, it was held, that the exhibition of effigies or any thing else in a shop window, calculated to collect a crowd upon the streets in front of the shop, is an indictable nuisance.

LOTTERIES.

SEC. 53. Lotteries, being regarded as mischievous games, are common nuisances, and any person setting up a lottery, or selling tickets therein, is punishable as for a common nuisance at common law, and also by statute 9 and 10 William 3, ch. 17.

FIRE-WORKS.

SEC. 54. Establishments for the manufacture of fire-works are common nuisances, and the fire-works themselves are so regarded, and any person firing them in any public street or place is punishable as for a common nuisance. This was also made an offense by statute 10 and 11 William 3, ch. 7.

MONOPOLIES.

SEC. 55. So, also, all monopolies were regarded as nuisances at common law, and also all schemes for "bubbling" the public, by raising money by subscription for commercial purposes, and assuming to act as a body corporate without a charter, or having a charter by assuming and exercising powers that were not thereby granted, and all persons engaged therein were punishable as for a common nuisance, and by statute 6 Geo., ch. 18, sec.

¹ *Hawkins' P. C.* 311. So, too, in *Williams v. East India Company*, 3 East, 192-201, the court said, "that of a dangerous and combustible nature is a criminal act, and punishable as for a nuisance." *Roscoe's Crim. Ev.* 645.

19, to the further pains of *premunire*; that is, of being by legal process, put outside the protection of the law. A statute which was much dreaded and regarded as execrable by the English people.¹

THEATRES.

SEC. 58. Play-houses or theatres were not regarded as nuisances *per se* at common law, but were regarded as such when they drew together such large numbers of people and coaches as to be generally inconvenient to the places adjacent, and HAWKINS says (vol. 1, p. 362, sec. 7, of his Pleas of the Crown): There seems to be a proper distinction between play-houses and other nuisances, for they, having been originally instituted with a laudable design of recommending virtue to the imitation of the people, and exposing vice and folly, are not nuisances in their own nature, but may only become such by accident, while the others cannot but be nuisances. Theatres, conducted properly, and so located as not to operate as a serious annoyance to the neighborhood, are not regarded as a nuisance. But when they are used for the exhibition of low and vicious plays that pander to the base passions of men, or when they call together disorderly and vicious people, they are nuisances, and that too of the worst type.²

COMMON SCOLD.

SEC. 57. A common scold is a common nuisance, and for the first offense was formerly punished by being put into the ducking stool, and for the second offense by fine and imprisonment. In the early cases a common scold was held not entitled to the benefit of counsel, but in *Regina v. Foaby*, 6 Mod. 213, Lord HALE granted that privilege, and also suspended sentence to give the respondent an opportunity to reform; or, as the reporter says, "to see how she would behave herself," "for," said Lord HALE, "if we duck her now she will go on scolding to the end of her life." A common scold may be said to be a woman (for the offense is confined to the female portion of society) who, by loud

¹ Hawkins' P. C. 364, sec. 11; *Penniman v. New York Balance Co.*, 13 How. Prac. Rep. (N. Y.) 40.

² *People v. Baldwin*, 1 Criminal Recorder (N. Y.), 286.

and offensive talk, by railing and brawling, annoys and disturbs the peace and quiet of the neighborhood.¹

SEC. 58. It is an indictable offense in this country, and although in Pennsylvania, in the case of *Commonwealth v. Hutchinson*, 3 Am. Law Reg. 113, in the common pleas court, the judge thought it was one of the relics of the dark ages, and not consistent with the "high tone" of the 19th century to treat it as an offense. His doctrine does not seem to be accepted even in his own State, and courts go on regarding it as an indictable offense precisely as though he had not struck this heavy blow at the law which had grown hoary and wrinkled from its extreme age. I think the court must have been of a highly progressive order to take such a sudden departure from the landmarks that had been so often and so firmly established by Pennsylvania courts, and if the learned judge had really become so advanced in physical refinement that the brawling tongue of a common scold would produce no annoyance to *his* senses, he should still have remembered that there are over 30,000,000 of people in this country who have not attained that desirable condition. As to the precise extent of annoyance necessary to constitute this offense, the cases give us but little information, or as to how extensively the habit must be fixed upon a person; but the rule, in this respect, undoubtedly is, that the practice must be so habitual as that it may fairly be said to be common. Anger is not an element of the offense.² On the contrary, anger excited by just provocation would be a full defense to a prosecution therefor.³ On the trial of an indictment for being a common scold, particular instances of scolding may be given in evidence, and, after conviction, the court will order the defendant to give security for her

¹ 4 Bl. Com. 168; *Commonwealth v. Harris*, 107 Mass. 108; *Rex v. Foxby*, 6 Mod. 11; *United States v. Royall*, 3 Cranch C. C. 620; *James v. Commonwealth*, 12 S. & R. (Penn.) 220; 1 Hawkins' P. C. 365, ch. 75, sec. 14; *Rolle's Case*, 4 City Hall Recorder (N. Y.), 174; *Field's Case*, 6 id. 90; in *J. Anson v. Stewart*, 1 L. R. 754, it was held, that it is not necessary to prove the words used by the respondent, but that it is

sufficient to prove that she is always scolding. *Roscoe's Crim. Ev.* 745; *Rex v. Cooper*, 2 Strange R. 1246; 1 Russell on Crimes, 303; *Commonwealth v. Foley*, 97 Mass. 497. But in Massachusetts it is a statutory offense, and applies to both sexes, and they are called "common railers and brawlers."

² *United States v. Royall*, 3 Cranch (U. S.), C. C. 620.

³ *Greenwault's Case*, 4 City Hall Recorder (N. Y.) 384.

appearance in court, from day to day, to hear judgment, and for her good behavior in the meantime. The indictment must charge her with being a common scold; an indictment charging her with being a common slanderer or common brawler will be bad.¹

SEC. 59. Eavesdroppers, or persons who go about secretly listening at doors or windows, or elsewhere, to the discourse of others for the purpose of framing tattle, are common nuisances at common law and punishable by fine, and were generally held to bail for good behavior.² A person listening at the door of a jury room, to hear the discussions of the jurors upon a case, or at any public building, office or room, comes fairly within the definition of the offense.³

SEC. 60. Bishop, in vol. 1, p. 1124, of his work on Criminal Law, refers to this offense as "one of the dark spots of the past fast receding from our view," and this is so not only of this particular offense, but also of many other common law offenses. No doubt at the time when these offenses were generally recognized as being of a serious character, the offense was much more serious than now, and in that period of the world's history, it may have been a wise and salutary provision, and one rendered necessary not only for the preservation of the peace of families, but often for the preservation of the government itself. But in this nineteenth century, when the light of civilization extends over nearly the whole earth, and when the peace of families, the reputations of men, and the stability of governments depend upon surer and more solid foundations, than during that period when the courts found it necessary to establish penalties for this offense, it is safe to leave the interests of society in the hands of our legislatures, and the practitioner will seldom find it necessary to resort to the common law, to secure the redress of any criminal grievance. But however that may be at the pres-

¹ *United States v. Royall*, 3 Cranch (U. S.) C. C. 618.

² *State v. Williams*, 2 Tenn. 101; *State v. Pennington*, 3 Head. (Tenn.)

³ 4 Bl. Com. 168; 1 Hawkins' P.C. 361; 299; 1 Russell on Crimes, 301; 1 Burns' *State v. Pennington*, 3 Head. (Tenn.) 299; *State v. Williams*, 2 Tenn. 108. Justice, tit. Eavesdroppers.

ent time, we cannot question the wisdom of the courts in those "ancient times" in making provision for the punishment of offenses not otherwise provided for. In the dark days of the world's history, the courts stood like a wall of adamant between the people and unjust and tyrannical rulers. In all periods they have preserved the peace, protected the morals, and upheld both individual and public rights, and the multiplicity of common law remedies for various offenses, shows the jealous care which they have always had for the welfare of the people, and the vigilance with which they have guarded and upheld their rights. But with however much admiration we may regard this fidelity to the interests of society, we cannot forget that society changes, and that every year, almost, renders changes in the law necessary to a proper adaptation to our social and political progress.

NUISANCES AFFECTING PUBLIC MORALS.

SEC. 61. As has previously been stated, any thing that is offensive to the morals of society, or that is indecent, is a public nuisance. Therefore, any indecent exposure of one's person in a public place, in the presence of several persons, is a public nuisance, and indictable and punishable as such at common law.¹ It is a nuisance because it shocks the moral sensibilities, outrages decency, and is offensive to those feelings of chastity that people of ordinary respectability entertain. But in order to constitute the offense, the exposure must be in a public place, and in the presence of more than one individual. The offense is committed even if done under the pressure of necessity, if it is in an improper and exposed place.² There has been some conflict of doctrine upon this branch of the law, and it may be well to notice it briefly, so that there may be no opportunity for mistake. And here it may be well in the first place to note the distinction between the statutory offense and the offense at common law. In most of the States there is an express statute providing that, "if any person shall be guilty of open and gross lewdness," etc., they shall be punished, etc. This statute does not affect or take away

¹ *Boom v. The City of Utica*, 2 Barb. (N. Y. Sup. Ct.) 104.

² But see *Miller v. People*, 5 Barb. (N. Y. Sup. Ct.) 203.

the common-law offense, unless in express terms it is so provided, therefore where, under an indictment for the statutory offense, the act is not so open and gross as to bring the party within the provisions of the statute, the respondent may, nevertheless, be convicted of the common-law offense, if the act charged brings him within the rule.¹

SEC. 62. In order to make out an offense under the statute, the exposure must be intentional, or so open and gross as to warrant a presumption of criminal intent; but at common law it is only necessary that the act be committed in a public place, in the presence of more than one person,² or in such a place that several persons are liable to witness it.³ I speak of this here so that there may no confusion arise in the examination of authorities, where the offense is laid under a statute, and where it is laid at common law.

SEC. 63. In North Carolina, in the case of *State v. Roper*, 1 Dev. & Bat. (N. C.) 208, it was held that in order to constitute the offense, it is not necessary that the act should be actually seen by the public; that if it was committed in such a public place, and under such circumstances, as to render it probable that it would be seen, whereby there was danger that the moral sensibilities of people might be shocked, that the offense was committed within the meaning of the law."

SEC. 64. In *State v. Millard*, 18 Vt. 574, under a statute providing that, if any person shall be guilty of open and gross lewdness," etc., it was held that where a man was guilty of indecently exposing his person to a woman whom he solicits to acts of sexual intercourse, persisting therein in spite of her remonstrances, he

¹ Knowles v. The State, 3 Day (Conn.), 103; State v. Rose, 32 Mo. 560; 1 Russ. on Crimes, 301; Hawkins' P. C., ch. 5, § 5; 4 Bl. Com. 65 n.; 3 Burns' Justice, tit. Lewdness; Rex v. Sedley, 1 Sid. 168; Rex v. Crunden, 2 Camp. 89.

² State v. Rose, 32 Mo. 560; State v. Millard, 18 Vt. 574; Regina v. Orchard, 20 Eng. Law & Eq. 598; Regina v. Holmes, 20 Eng. Law & Eq. 597; Regina v. Thallmun, 1 Leigh &

C. 326. In Regina v. Elliott, Leigh's Cas. 103, the respondents committed fornication on a public common near a foot-path, where any one passing along could see them, but they were actually seen by only one person. The court were unable to agree as to whether this was an indictable nuisance, and the respondents were discharged without judgment being passed.

³ Rex v. Crunden, 2 Camp. 89.

was guilty of the offense, and WILLIAMS, Judge, says: "I am not satisfied that the conduct of the respondent would not be indictable at common law, notwithstanding the intimation to the contrary in *Fowler v. The State*, 5 Day's Conn. 81;" and he refers to a precedent of an indictment in the 2d of Chitty, 41, on which one Bennett was convicted, which would have been sustained upon the same evidence as that given in the case under consideration. In *Rex v. Crunden*, 2 Campbell, 89, it was proved that the defendant undressed himself upon the beach to bathe in the sea, near inhabited houses, from which he could be seen; although the houses had been recently erected, and previous to their erection the place had been commonly used as a bathing place, he was convicted, although there was no evidence that the respondent was actually seen by any of the occupants of the house. So in the case of *The Commonwealth v. Sharpless*, 2 S. & R. (Penn.) 91, it was held that the exposure of an obscene print need not be public to make the offense indictable, holding "that an offense may be indictable, if, in its nature, and by its example, it tends to the corruption of morals, although it be not committed in public."

SEC. 65. In *Rex v. Gallard*, W. Kel. 163, it was held, that in order to constitute the offense, there must be an exposure of the private members of the body; that it is no offense for a woman to go through the public streets stripped to the waist. But the doctrine of this case may fairly be questioned as inconsistent with the principles that underlie the doctrine upon which this class of nuisances are predicated; that is, that any thing offensive to the moral sensibilities, or calculated to shock the ordinary feelings of chastity or decency of mankind, is a nuisance. It is true the court say that "nothing appears immodest or unlawful," but the judgment of the court upon the latter point will hardly commend itself to the tastes of the people of the nineteenth century, and BISHOP, in vol. 1, p. 1131 of his work on Criminal Law, in com-

¹ In *Rex v. Webb*, 2 Car. & K. 933, it was held, that whether an indictment which charges the respondent with having, "in a certain public place within a certain victualling ale-house, indecently exposed his person to one

M. A., the wife of B., and other the liege subjects there," is good, is questionable; but if it appear in evidence that the exposure was in the presence of M. A., the wife of B., only, a conviction cannot be sustained.

menting upon this case, expresses the opinion that its doctrine is not well sustained upon principle.

SEC. 66. In *Miller v. The People*, 5 Barb. (N. Y. Sup. Ct.) 203, it was held, that in order to make out the offense, the evil intent must be made out and be passed upon by the jury. This is true where the indictment is for the statutory offense of open and gross lewdness, but it is not true as applied to the common-law offense. If a person, upon a principal street of a city, where people are passing at all times, does an indecent act, whether with an evil intent or under the pressure of an actual necessity, the offense is committed, and he is as much subject to indictment in the one case as in the other. If a person bathes in a public river, within view of those passing along a highway, or within sight of dwelling-houses that are actually inhabited, although he does so with no improper motive, and with the sole view of making himself clean, yet he is liable to indictment and punishment as for a common nuisance; and the fact that he has so far violated the rules of propriety and ordinary decency, as to expose his person in such a public place, is sufficient of itself to raise all the necessary presumption of wrongful intent. In the case of *Rex v. Sir Charles Sedley*, 1 Sid. 168, the defendant was indicted for showing himself naked from a balcony in Convent Garden to a large multitude of people there assembled. He exposed himself thus with no evil intent or purpose; yet he was convicted on his own plea and sentenced to pay a fine of 2,000 marks, to be imprisoned for one week, and give sureties for his future good behavior. So far as the nuisance is concerned, it is not a question of intent at all. It is a question of results. If one does an act, the reasonable and probable consequences of which will be to shock the moral sensibilities of mankind, and offend the ordinary proprieties and decencies of society, he is presumed to intend all the consequences of his act, and he has committed the offense, let his intent be what it may. In the case of *Sir Charles Sedley*, he was convicted, even when in fact there was no evil intent; but when the act was done because of his idea that it was his duty to do so; and the reason why he was convicted was, because the act was done in a public place, to the common scandal of society, and in

violation of the rules of decency and morality. *IL. Rex v. Crunden*, previously referred to, McDONALD, J., says: "I can entertain no doubt that the defendant, by exposing his person on the occasion referred to, was guilty of a misdemeanor. The law will not tolerate such an exhibition. *Whatever his intention might be, the necessary tendency of his conduct was to outrage decency and to corrupt the public morals.* Nor is it any justification that bathing in this spot might a few years ago have been no offense; for any thing that I know, a man might have danced naked a few years ago in the fields near Montague House, but the learned counsel would hardly claim that one might now do so with impunity in Russell Square. Whatever place becomes the habitation of civilized men, there the laws of decency must be observed." And in this case the conviction was sustained, but, because of the entire lack of wrongful intent, the court allowed him to go on his own recognizance, to be present when the court should call on him. Thus, it will be seen that it is not a question of evil intent, but of actual results. It is the place that is of the essence of the crime. The law presumes the intent when the exhibition is in such a place as to be in plain violation of the laws of decency and morality. If the place is public, the offense is committed, unless it is purely accidental; but if the place is not public, it must be in the presence of several persons and intentional.

SEC. 67. In the case of *Miller v. The People*, above referred to, the offense was not, in fact, committed in a public place, and was committed under such circumstances that it could in no sense be said to be in violation of decency, so that the court might well say that no presumption of wrongful intent could be raised. In that case the respondents were bachelors, and lived alone in a house of their own in the neighborhood of two or three other houses. The only house in view of the yard in which the offense was committed was the one next adjoining, and which was separated from their yard by a high board fence, so that, the court say, the respondents had no reason to suppose that they would be seen. But the wife of the person living in the adjoining house, with whom they were not on good terms, accidentally saw them in the

yard with no clothing on except their shirts. They were there in that plight in consequence of the extreme heat. The neighbor watched them and made complaint. They were convicted on trial and fined \$200 each, but the supreme court set the verdict aside. The conviction was evidently wrong, because the exposure complained of was not in a public place, and was not committed under such circumstances as to be in violation of public decency. The court were warranted in holding that an evil intent must be shown in order to constitute the offense, when not committed in a public place; but when the act is committed in a public place it is *malum in se*, and whether the intent was wrongful or not, is a matter of no consequence, and no authority can be found that so holds. The offense consists in doing that which is in violation of public decency and offensive to morality in a public place, or in the presence of divers persons, and the intent with which the act is done, has no influence either in creating or excusing the offense. It stands precisely upon the same ground in this respect with any other nuisance. If the act is accidental it is excusable, otherwise it is not. In the English cases the offense is made to depend upon the fact, whether the act is done in a public place or not. In *Regina v. Holmes*, 20 Eng. Law & Eq. 596, it is said that "an exposure in a private place or for the purpose of private annoyance is not an offense cognizable at common law." MARTIN, B., says: "It must be to the public injury." The same doctrine was held in *Rex v. Crunden*, 2 Camp. 89, also in *Regina v. Orchard*, 3 Cox's C. C. 248. In this case the indictment was for an unlawful exposure in Farrington Market. It was an inclosure formed of Portland stone, with divisions or boxes like the urinals at railway stations. It was open to the public for certain lawful purposes, but otherwise inclosed. There was a hole in the stone work to enable persons to look through and watch the proceeding inside. It was held by all the court that this was not a public place within the meaning of the law for the purposes of indictment. The case of *Regina v. Watson*, 2 Cox's C. C. 376, turned upon the same point. The defendant was convicted upon an indictment charging him with indecently exposing his person in a certain open and public place in the presence of one Lydia Crickmore. The second count charged

him with the same offense as committed in the presence of divers persons. The proof showed that it was in the presence of Lydia Crickmore alone. He was convicted on the first count, but in the Queen's Bench the conviction was set aside. In *Regina v. Webb*, 1 Den. C. C. 338, the exposure was to one person in a public house, and this was held not a public place within the rule. In *State v. Roper*, 1 Dev. & Bat. C. C. 208, it was held that an indictment charging an indecent and scandalous exposure to public view in a public place, is sufficient, even though it is not alleged that it was in the presence of any person. So in *Grisham v. The State*, 2 Yerg. (Tenn.) 589, it was held that it need not be alleged that the act was committed in the public streets, or under the immediate view of divers persons. In *Britain v. The State*, 3 Humph. (Tenn.) 203, it was held that where a master permitted his slave to pass in the public streets indecently naked he was liable as for a public nuisance, and in *Nolin v. The Mayor*, 4 Yerg. (Tenn.) 163, it was held a public nuisance to exhibit a stud horse in the streets of a town, and the same has been held in other States. So, too, it is equally a nuisance to expose the persons of others publicly, or to exhibit any monstrosity.¹

SEC. 68. It is an offense at common law for a man and woman to live together in adulterous intercourse, and persons thus offending may be indicted as for a common nuisance, on account of the open and notorious lewdness of the act.² But adultery or fornication, committed in a private manner, are not punishable criminally at common law. Such acts must be so open as to be a public scandal to be a nuisance. It is held that in order to excuse the offense it is not competent for the parties to prove that they have verbally contracted marriage and live together as husband and wife in pursuance thereof.³ But if the indictment is for the com-

¹ *Britain v. The State*, 3 Humph. (Tenn.) 203; *State v. Roper*, 1 Dev. & Bat. (N. C.) 208; *State v. Rose*, 32 Mo. 560; *Miller v. People*, 5 Barb. (N. Y. S. C.) 203.

² *Hawkins' P. C.* (vol. 105), § 4; *State v. Moore*, 1 Swan (Tenn.), 136; *State v. Bailey*, 2 Humph. (Tenn.) 414; *State v. Gooch*, 7 Blackf. (Ind.) 468; *Dameron v. State*, 8 Mo. 494; *Lawson v. State*, 20 Ala. 65; *State v. Fore*, 1

Iredell (N. C.), 378; *State v. Potet*, 8 Iredell (N. C.), 23; *Anderson v. Commonwealth*, 5 Rand. (Va.) 627; *Grisham v. State*, 2 Yerg. (Tenn.) 589; *Rex v. Johnson*, Comb. 377; *Clayton's Case*, 12 Mod. 566; *State v. Coyle*, 2 Humph. (Tenn.) 414; *Rex v. Talbot*, 11 Mod. 415.

³ *Grisham v. State*, 2 Yerg. (Tenn.) 589.

mon-law offense, it would seem that this would be regarded as a defense, where the parties are competent to contract marriage, for at common law such cohabitation would create the relation of husband and wife. But this could not be held where the parties, or either of them, are incompetent to marry. However, these offenses are regulated by legislation, and resort to an indictment for the common-law offense will seldom be had.

SEC. 69. So, too, all obscene pictures, prints, books or devices are common nuisances, and any person having them in his or her possession for the purposes of exhibition or sale may be indicted therefor at common law, because they are clearly in derogation of public morals and common decency.¹

ACTS AFFECTING HEALTH.

SEC. 70. It is a public nuisance, for a person afflicted with an infectious or contagious disease, to expose himself in a public place, whereby the health of others is jeopardized.² So, too, it is an offense of the same character for a person to expose one afflicted with such a disease in a public place.³ So, too, a hospital for the reception and treatment of patients with contagious diseases, established in a public place, is a public nuisance, and indictable as such.⁴ So a depot for the landing of emigrants in a public place, near to places of business or private residences, is a public nuisance.⁵ So, too, it is a public nuisance for a person to take a horse afflicted with glanders or other infectious diseases into a public place, particularly to water it at a public watering place.⁶ But a person sick in his own house, or in a room in a hotel, is not a nuisance.⁷ Nor is it a nuisance for a person to use his own premises for a hospital for the treatment of horses or cattle affected with contagious diseases, or to pasture sheep upon his own premises affected with foot rot.⁸ But it would be an

¹ *Commonwealth v. Holmes*, 17 Mass. 336; *Commonwealth v. Sharpless*, 2 S. & R. (Penn.) 91.

² *Rex v. Vantadillo*, 4 M. & S. 73.

³ *Rex v. Burnett*, 4 M. & S. 472; *Rex v. Sutton*, 4 Burr. 2116; 1 Russ. on Crimes, 113.

⁴ *Rex v. Vantadillo*, 4 M. & S. 73; *Wolcott v. Mellick*, 3 Stockt. (N. J.) 309.

⁵ *Brower v. New York*, 3 Barb. (N. Y.) 234.

⁶ *Mills v. Railroad Co.*, 2 Rob. (N. Y.) 326; *Barnum v. Van Dusen*, 16 Conn. 200 (sheep afflicted with foot rot).

⁷ *Mills v. Railroad Co.*, 2 Rob. (N. Y. Sup. Ct.) 326.

⁸ *Fisher v. Clark*, 41 Barb. (N. Y. Sup. Ct.) 329.

indictable offense for a person to take sheep affected with foot rot to a public fair or other public place where the disease would be likely to be communicated to the sheep of many persons.

SEC. 71. So it is a public nuisance for a person to sell diseased or corrupted meat, or unwholesome or adulterated foods or drinks of any kind deleterious to health.¹ In order to constitute the offense, the meat, food, or drink must be of such a noxious, unwholesome and deleterious quality as to be injurious to health if eaten.² But it has been held that it is not necessary to set forth in the indictment that the articles were sold to be eaten.³ In order to make out the offense it is necessary to show that the person knew that the provisions were diseased or adulterated, although the taint or adulteration is imperceptible to the senses, and produces no perceptible injury to the health of those consuming it.⁴ Knowledge of the diseased condition of meat, or of the noxious and unwholesome quality of food, may be inferred from circumstances.

Thus in *Goodrich v. People*, 5 E. D. Smith (N. Y.), 549, it was held that the jury might infer guilty knowledge on the part of the respondent, from the fact that he knew that the abscess or the sore in the head of the cow (for the selling of the meat of which he was indicted) had existed and been increasing several months, and that he was liable, even though the taint was imperceptible to the senses, and produced no apparently injurious consequences to those who ate it. In *Rex v. Dixon*, 3 Maule & Selwyn, 11, the respondent was convicted on an indictment for selling bread in which alum was mixed, and it was held that he was chargeable, even though the bread was mixed by his servants, as it would be presumed that the adulteration was made with his knowledge and by his directions.

SEC. 72. A public exhibition of any kind that tends to the corruption of morals, to a disturbance of the peace, or of the

¹ *State v. Smith*, 3 Hawks, 376; *State v. Norton*, 2 Iredell (N. C.), 40; *Goodrich v. People*, 2 Parker's Crim Rep. (N. Y.) 622; *Goodrich v. People*, 5 E. D. Smith (N. Y.), 549; *Rex v. Dixon*, 3 M. & S. 11; *Daly v. Webb*, 4 Irish R. (C. L.) 309.

² *State v. Norton*, 2 Iredell (N. C.), 40; *State v. Smith*, 3 Hawkins (N. C.), 378.

³ *Goodrich v. People*, 8 Parker's Crim. Rep. (N. Y.) 622.

⁴ *Goodrich v. People*, 5 E. D. Smith (N. Y. C. P.), 549.

general good order and welfare of society, is a public nuisance.¹ Under this head are included all puppet shows, legerdemain, obscene pictures, and any and all exhibitions, the natural tendency of which is to pander to vicious tastes, and to draw together the vicious and disorderly members of society.²

COMBUSTIBLE ARTICLES.

SEC. 73. The keeping of gunpowder, nitro-glycerine, or any other combustible or dangerous material in a public place, or a public street, or on a highway over which people have a lawful right to pass, is a public nuisance, and indictable and punishable as such.³ In the case of *People v. Sands*, 1 Johns. (N. Y.) 78, it was held, that the keeping of gunpowder in large quantities in a public place did not constitute an indictable offense, unless it was *negligently* kept; but this does not appear to be the doctrine of the more recent cases. In *Weir v. Kirk* (decided October, 1873), SHARSWOOD, J., in delivering the judgment of the court, referred to the opinion of the court in *Rhodes v. Dunbar*, 7 P. F. Smith (57 Penn. St.), 274, and adopted its language and doctrine as the doctrine of this case. "These observations give no just ground for the inference that a 'powder magazine,' or depot of 'nitro-glycerine,' or other like explosive materials, might not possibly be enjoined, even if not prohibited, as they usually are, by ordinance or law. It is not alone on the ground of their liability to fire, primarily or even secondarily, that they may possibly be dealt with as nuisances, but on account of their liability to explosion by contact with the smallest spark of fire, and the utter impossibility to guard against the consequences or set bounds

¹ *Rex v. Bradford*, Comb. 304; *Hall's Case*, 1 Ventris, 169; *Knowles v. The State*, 3 Day (Conn.), 108; *Jacko v. The State*, 22 Ala. 73; *Pike v. Commonwealth*, 2 Duvall (Ky.), 89.

² *Thurber v. Sharp*, 13 Barb. (N. Y. Sup. Ct.) 627; *Rex v. Carlisle*, 6 C. & P. 636; *Walker v. Brewster*, Law Rep., 5 Eq. 28; *Willis v. Warren*, 1 Hilt. (N. Y. C. P.) 590.

³ *Malcolm v. Myers*, 6 Hill (N. Y.), 293; *Fillo v. Jones*, 2 Abb. (N. Y.) 121; *Bradley v. People*, 56 Barb. (N. Y.) 72; *Cheatham v. Shearon*, 1 Swan. (Tenn.) 213; *Williams v. East India Co.*, 3

East, 192; *Trueman v. Casks of Gunpowder*, *Thacher's Crim. Cases*, 14; *Anonymous*, 12 Mod. R. 342; *Rex v. Taylor*, 2 Stra. 1167; *Biggs v. Mitchell*, 31 L. J. M. C. 163; *Weir v. Kirk* (Penn.), reported in *Law Times* (N. S.), No. 1; *Rhodes v. Dunbar*, 7 P. F. Smith (Penn.), 274. In *Hepburn v. Lordon*, 2 Hem. & Mill. Ch. 345, the defendant was restrained from storing or keeping damp jute, a highly combustible article, on his premises, near the premises of the plaintiff. *Regina v. Lister*, 3 Jurist, 570; *Crowder v. Tinkler*, 19 Ves. Jr. 617.

to the injury, which, being instantaneous, extends alike to property and persons within its reach. The destructiveness of these agents results from the irrepressible gases, once set in motion, infinitely more than from fires which might ensue as a consequence. Persons and property in the neighborhood of a burning building, let it burn ever so fiercely, in most cases have a chance of escaping injury. Not so when explosive forces instantly prostrate every thing near them, as in the instances of powder, nitro-glycerine, and other chemicals of an explosive or instantly inflammable nature." And in this case (*Weir v. Kirk*), the erection of a powder magazine, intended for the reception of large quantities of powder, on the line of a public highway over a half mile distant from the plaintiff's residence, was enjoined. Thus it will be seen that the fact of *negligent* keeping is not regarded as an element. The fact of its presence in a locality where it *may* result disastrously is sufficient.

SEC. 74. Any thing that creates unnecessary alarm or anxiety in the public mind, such as the publication of false reports of an intended invasion, or of the reported presence in a community of a child-stealer, which is calculated to disturb the public mind and create false terror or anxiety, is a public nuisance, and was so held in *Commonwealth v. Cassidy*, 6 Phila. R. (Penn.) 82. In that case a false hand-bill was circulated, cautioning the public to look out for a child-stealer, who was represented to be a black woman, and then in the city, and fully describing her. The statement was wholly false, but naturally created great alarm in the city. The person circulating the bills was indicted therefor as for a public nuisance, and the court held that the indictment would lie, "that mental anxiety, induced from any cause, is a fruitful source of bodily disease, as well as of death itself, and any false publication, calculated unnecessarily to excite it, is a public nuisance."

SEC. 75. There are, in addition to the matters previously named in this chapter, a multitude of uses of property that are indictable as public nuisances; but, as these matters will be specifically treated in other chapters of this work, it will be unnecessary to treat of them *in extenso* here. All obstructions of a highway, or

encroachments thereon,¹ as well as all obstructions of navigable streams, or encroachments on the rights of the public therein,² are indictable offenses. For particular instances, see chapters on Highways and on Navigable Rivers. Any use of property in a public place, which endangers the *safety* of the people, as the keeping of gunpowder, nitro-glycerine or any explosive material; or the keeping of dangerous and ferocious animals;³ or the health or comfort of the people, as the carrying on of noxious or offensive trades in public places or on public thoroughfares;⁴ or the penning back of the water of a stream, so as to render it stagnant or prejudicial to the health of the neighborhood;⁵ or the taking of horses affected with the glanders, or other contagious diseases, into public places;⁶ the making of loud noises with instruments or otherwise in the night-time, to the disturbance of a neighborhood;⁷ the placing of any thing near a highway calculated to frighten horses;⁸ to erect pig-styes and keep hogs therein in a public place;⁹ or the carrying on of the business of slaughtering animals in a public place or near a public highway.¹⁰ Indeed it may be stated as a general proposition that *any* use of property that produces a nuisance to an individual, may be the subject of indictment, if it is also in any wise injurious to the public. In order to constitute a public nuisance, the injurious results to the public must always be of such a character and extent, that, if affecting the rights of an individual only, they would form the basis of a private action. The only distinction

¹ *Regina v. Un. King. Telegraph Co.*, 31 Law J. (M. C.) 167; *Turner v. Ringwood Highway Board*, L. R., 9 Eq. Cas. 418; *Rex v. Wright*, 3 B. & Ad. 683.

² *Rex v. Russell*, 6 B. & C. 572; *The People v. Vanderbilt*, 26 N. Y. 287.

³ *The People v. Sands*, 1 Johns. 74; *Rex v. Taylor*, 2 Stra. 1167; *Biggs v. Mitchell*, 31 Law J. (M. C.) 163. In 2 Rolle's Abr. 139, Pl. 3, it is said that the overcrowding of houses with poor people in time of infection of plague, and thereby endangering the health of a neighborhood, is an indictable offense, and this principle has been recognized by numerous cases in this country. See *Meeker v. Van Rensselaer*, 15 Wend. (N. Y.) 377; *State v. Purse*, 4 McCord, 472. The keeping of ferocious animals,

and permitting them to run at large, *knowing* their ferocious propensities, is an indictable offense. 4 Burns' Justice, 578; Roscoe's Crim. Ev. 745; *Kelly v. Tilton*, 8 Keyes (N. Y.), 263.

⁴ *Rex v. Pappineau*, 1 Stra. 686; *Rex v. Niel*, 2 C. & P. 433; *Rex v. White*, 1 Burr. 333; *Rex v. Wigg*, 2 Ld. Raym. 1163.

⁵ *Munson v. The People*, 5 Parker's Crim. R. (N. Y.) 16; *Commonwealth v. Webb*, 6 Rand. (Va.) 726; *State v. Close*, 35 Iowa, 570.

⁶ *Regina v. Henson*, 1 Dears. (C. C.) 24.

⁷ *Rex v. Higginson*, 2 Burr. 1233.

⁸ *Judd v. Fargo*, 107 Mass. 294.

⁹ *Rex v. Wigg*, 2 Ld. Raym. 1163.

¹⁰ *Taylor v. The People*, 6 Parker's Crim. Law (N. Y.), 347.

between a public and private nuisance arises from the difference in effect. In the one case, it is confined to a single individual or to an injury to individual rights, while in the other, it affects the rights of individuals only as members of the public.¹ It is not so much a question whether a large number of persons happened to be annoyed by the act, as, whether the act *itself* was such, and in such a *place* as that the natural effect thereof would be to annoy or offend all who came within its sphere.² In the case of *State v. Baldwin*, 1 Dev. & Batt. (N. C.), 195, it is not quite easy to understand the position of the court, and it is quite evident that it had no clear or definite notion of the principles controlling this class of wrongs. In that case a large number of individuals assembled in a *public place*, and *profanely* and with loud voices, cursed, swore and quarreled in the hearing of divers persons, and by their boisterous and offensive conduct caused a singing school in the vicinity to be broken up, but the court held that this did not constitute a public nuisance. The court say: "In order to make an act indictable as a nuisance, it should be an offense so inconvenient and troublesome as to annoy the *whole* community." The utter absurdity of this position is evident. Carrying out the principle to its legitimate sequences, there never could be an indictment sustained for such offenses, except in small communities. An obstruction of a highway would not be indictable unless every member of the community was annoyed thereby; the obstruction of a navigable stream could never be an indictable offense unless every person turned sailor and ran his boat in the vicinity of the obstruction so as to be subjected to its annoyance. The exposure of a person infected with a contagious disease in a public place, would be no offense, unless the whole community came in contact with him, and so with the whole catalogue of offenses of this character. The rule is, not that a whole community must be offended by the act or thing, but that the act or thing must be of such a *character*, and in such a *place*, as is calculated to make it offensive to all persons of ordinary sensibilities, who, in the exercise of a legal right, come in contact with it.³ Indecent language in a public place, or

¹ *Soltau v. De Held*, 2 Sim. (N. S.) 133; 9 Eng. Law & Eq. 104.

² *Soltau v. De Held*, id.

³ *Walter v. Selfe*, 4 Eng. L. & Eq. 15.

profane cursing and swearing in a loud voice and boisterous manner, are offenses calculated to shock the moral sensibilities of every person who is fit to be regarded as a member of any community, and come clearly within the idea of a public nuisance. The erection of a slaughter-house upon a public highway, but so far removed from human habitations as to produce no annoyance to them, is nevertheless a public nuisance if the smells issuing therefrom are offensive to those who pass upon the highway, though the members of the community are benefited, and in no measure offended thereby.¹ In *Rex v. Niel*, 2 C. & P. 483, the defendant was indicted for carrying on the business of a varnish maker near a highway, which proved to be offensive to those passing thereon. Lord ABBOTT, in submitting the case to the jury, said: "The only question for you to determine is, is the business as carried on by the defendant, productive of smells offensive to persons passing along the public highway." And the rule thus laid down is in accordance with the settled doctrine of the courts. The test is, not whether a whole community is annoyed by the act or thing, but is it in a public place, and of such a character as is likely to be offensive and an annoyance to those who come within its sphere.²

SEC. 76. In order to render a person liable for a public nuisance, by carrying on a noxious trade, or maintaining any thing that produces noxious smells, it is not necessary that the smells should be injurious to health. It is sufficient if they are of such an offensive character as to be materially offensive to the senses, and such as impair the physical comfort of those who come within their sphere.³

AGAINST WHOM AN INDICTMENT WILL LIE.

SEC. 77. The person erecting, as well as the person maintaining a public nuisance, are liable to indictment therefor, jointly or individually, at the election of the prosecuting officer.⁴ A landlord who rents premises for a purpose which in the very nature

¹ *Taylor v. The People*, 6 Parker's (N. Y.) 576; *Rex v. White*, 1 Burr. 333; *Crim. Law* (N. Y.), 347.

² *Soltan v. De Held*, 9 Eng. Law & Eq. 104.

³ *Catlin v. Valentine*, 9 Paige's Ch. 15.

⁴ *Pendrudock's Case*, 5 Coke, 100.

of things would become a public nuisance, is equally liable with the tenant, to indictment therefor. So too when one erects a nuisance, and lets the premises to another, with the nuisance still existing, he is liable to indictment, precisely the same as though he had not demised the premises,¹ and even though he cannot lawfully enter to abate it.² Where a tenant goes into the possession of premises knowing that a nuisance exists thereon, and maintains it, he is liable to indictment therefor. But in order to render him liable he must *maintain* the nuisance in the strict sense of the word. That is, he must be so situated in reference thereto, and must so conduct himself, that he would be liable to a civil action for individual damages resulting therefrom. In order to charge the tenant he must be aware of its existence and promote or continue the nuisance after he comes into possession.³ A landlord who lets premises for a particular purpose, which may or may not become a nuisance, according to the manner in which the tenant conducts the business, is not liable either to an action or to indictment therefor, unless he had reasonable grounds to believe that the nuisance would be created from such use.⁴ Neither is the landlord liable for a nuisance created by the tenant, when the nuisance arises from a use of the premises which was not contemplated by the lease.⁵ But if a tenant creates a nui-

¹ Roswell v. Prior, 12 Mod. 639. In this case, Lord Holt says: "It is a fundamental principle in law and reason, that he who does the first wrong shall answer for all consequential damages; and here the original erection does not influence the continuance, and it remains a continuance from the very erection, and by the erection until it be abated." Leslie v. Pound, 4 Taunt. 649; Bishop v. Trustees, etc., 28 L. J. (Q. B.) 215.

² Thompson v. Gibson, 7 M. & W. (Exch.) 455. In this case, PARKE, B., lays down the rule thus: "It is said that the defendants cannot now remove the nuisance without being guilty of a trespass, and that it would be hard to make them liable; but that is a consequence of their own original wrong, and they cannot be excused by showing their inability to remove it." This is the universal rule.

³ People v. Erwin, 4 Denio (N. Y.), 129; Tenant v. Goldwin, 1 Salk. 21;

Hoane v. Dickenson, 2 Ld. Raym. 1568; Lord Egremont v. Pulman, M. & M. 404; Brown v. Russell, L. R. (3 Q. B.) 251. See authorities cited on this point in chapter on Private Nuisances.

⁴ Fish v. Dodge, 4 Denio (N. Y.), 311; Pickard v. Collins, 23 Barb. (N. Y. Sup. Ct.) 444; Rich v. Basterfield, 4 C. B. 805; Brown v. Russell, L. R. (3 Q. B.) 251.

⁵ Rich v. Basterfield, 4 C. B. 805. In this case the landlord erected a coffee-house, with a low chimney under the plaintiff's windows, and let it. The tenant lighted a fire in the chimney and created a great smoke, which was a nuisance to the plaintiff's house. It was held, that the landlord was not liable as if the tenant had used coke or charcoal in the chimney, or had abstained from the use of the chimney when the wind blew in the direction of the plaintiff's house, the nuisance would not have been created, and that the presumptions were all in favor of the landlord.

sance before the expiration of his term, and the landlord renews the lease knowing of the existence of the nuisance, he becomes liable to the same extent thereafter as though he had erected the nuisance himself.¹ A person who erects a structure that is a nuisance, and then parts with his title to the premises, and covenants with his grantee for quiet enjoyment and a right to maintain the erection, is liable both civilly and criminally for its continuance, upon the ground that by his relations with the occupier he affirms the nuisance, and he is regarded in law as continuing it. But when such an erection is made by the owner of the fee, and he parts with the title and possession, he is liable for erecting and upholding the nuisance, during the period he held the title, but he is not liable for a continuance of the nuisance, unless from the terms of his conveyance, he can fairly be said to affirm and uphold it, and action or indictment must be brought within the period designated by the statute of limitations.² The person in possession who continues the nuisance, or upholds it, is always liable therefor, but in order to fix his liability he must have done some act to continue it. If one diverts water from the land of another and turns it upon his own, his heir is not liable merely for using the water so diverted, if he has done no act to continue the nuisance.³ The ground upon which the alienor is held liable for a nuisance erected by him, is that he is the author of the original wrong, and transferring the premises with the original wrong still existing, is treated as affirming the continuance of it. The indictment can be sustained against either or both of them. But in order to make the alienee liable for a continuance of the nuisance he must have done some act to uphold the original wrong. This may be established by proof of user, either by himself or by others by his permission, or that he has let the premises and receives rent therefor.⁴ In all cases where it is sought to fix the liability of the tenant or alienee for the maintenance of a nuisance existing when he went into possession, except where he has actually *used* the nuisance, or done some act that

¹ *The People v. Townsend*, 3 Hill (N. Y.), 479; *Vedder v. Vedder*, 1 Denio (N. Y.), 257.

² *Waggoner v. Jermaine*, 3 Denio (N. Y.), 306.

³ *Hughes v. Murry*, 3 Har. & McHen. 441.

⁴ *Wheaton's Selwyn*, vol. 2, p. 356; *Cro. Jac.* 373.

amounts to a continuance of it, he should be notified to abate it, and if, after the lapse of a reasonable time thereafter, he fails to abate it, he is liable for its continuance.¹ A corporation is liable for a nuisance created by its servants or agents, even though the officers thereof had no knowledge of its creation, and even though the nuisance arose from the doing of an act in a manner different from that in which it had been directed to be done.² So too a master is liable to indictment for a public nuisance created by his servant while in the course of his employment, but the act by which the nuisance was created must have been done strictly within the course of his employment, and while in the discharge of his duties pertaining thereto, and must be of such a character as to be fairly deemed to be in execution of his master's will, for, when a servant, even in the course of his employment, so far ignores his master's will as to set up and execute his own, wantonly and maliciously, he cannot be treated as doing his master's will, and the master will not be liable therefor. But when an act within the scope of his employment is done by a servant in disobedience of his master's orders, or contrary thereto, the master will be liable therefor if the servant merely acted injudiciously, and not wantonly or maliciously.³ So too when one employs another to perform a certain kind of work under a contract, if the nature of the work is such as necessarily will create a nuisance, the employer is liable therefor, both civilly and criminally, but when the nuisance is not a necessary incident of the work to be done, but results from the improper execution of it, the contractor alone is liable.⁴ It should also be borne in mind that whenever a nuisance is created by a servant, agent or other person, for which the principal or employer is liable, the servant, agent or other person or persons through whose agency it was

¹ *Pendrudock's Case*, 5 Coke, 100; *Winsmore v. Greenbank*, Willes, 586; *Salmon v. Bensley*, R. & M. 189.

² *Rex v. Medley*, 6 C. & P. 292. In this case it was held, that the directors of a gas company are liable for the acts of their agents, though they are personally ignorant of the plan adopted, and it is an actual departure from the original plan which they had supposed was being pursued.

³ *Langher v. Pointer*, 5 B. & C. 576;

Eng. Com. Law, 324; *Cosgrove v. Ogden*, 49 N. Y. 255; *McManus v. Crickott*, 1 East, 106; *Bowcher v. Naidstrom*, 1 Taunt. 368.

⁴ *Chicago v. Robbins*, 2 Black (U. S.), 204; *Ellis v. Sheffield Gas Co.*, 2 Ell. & Bl. 757; *Hole v. Sittingbourne R. R. Co.*, 6 H. & N. 500; *Brownlaw v. Metropolitan Board of Works*, 33 Law J. (C. P.) 233; *Blake v. Thirst*, 32 Law J. (Exch.) 188.

created, are equally liable, and may be jointly sued or indicted therefor with him.¹ An infant is liable for a nuisance created upon premises belonging to him, by his direction, but it seems that an infant of tender years, who has not the control or management of his property, and has not attained that age when he can be regarded as having discretion, is not liable for a nuisance erected or maintained thereon by others.²

SEC. 78. A municipal corporation is liable to indictment where it has the power and neglects to do that which the common good requires. As for non-repair of streets or bridges, or allowing its streets to remain in a filthy condition, or for neglecting to cleanse a basin which it has the power to excavate, deepen and cleanse, after such basin, by the aggregation of mud and other substances, becomes foul and emits noisome and unwholesome stench to the detriment of the public.³ Indeed a municipal corporation has no more immunity from indictment for nuisances created by it than an individual, and any use of its property that creates a nuisance either to public or individual rights is indictable or actionable precisely the same as though done by an individual. See chap. on Municipal Corporations, *infra*.

SEC. 79. As to whether the exercise of a particular trade, or a particular use of property constitutes a public nuisance, depends, as has before been stated, upon the *place* and the character and effects of the nuisance. The fact that a butcher-shop, a grocery, a brewery or any other lawful business renders the use of property in its vicinity less agreeable or less valuable, does not make the business a nuisance. In order to create a nuisance, the business must be conducted in such a manner as to be offensive to men of ordinary sensibilities, judged by the simple habits and notions ordinarily prevailing among the people, and as to render the enjoyment of the property within the sphere of its effects physically uncomfortable.⁴ It is not trifling annoyances with which the law deals, but *real, substantial* injuries that are

¹ *Wilson v. Peto*, 6 Moore (Eng.), 47; *Gandy v. Jubber*, 31 Law J. (Q. B.) 151; *Saxby v. Manchester Railroad Co.*, 38 Law J. (C. P.) 154.

² *People v. Townsend*, 3 Hill (N. Y.), 479.

³ *People v. Mayor of Albany*, 11 Wend. (N. Y.) 539.

⁴ *Walter v. Selfe*, 4 Eng. L. & Eq. 15.

calculated to offend the senses of men of simple tastes and habits, and that render the enjoyment of rights in its vicinity physically uncomfortable. Conveniences are not balanced. The use of property that produces the nuisance may be very convenient to the owner, and even convenient and useful to the public, but if the effects are such as to bring it within the legal idea of a nuisance, this furnishes no defense whatever.¹

SEC. 80. Neither is the fact that the business has been carried on, or the use of property indulged in for a great length of time, any defense to an indictment for a nuisance. The law is, that no length of time can prescribe for a public nuisance of any description.² Neither is it any defense that when the nuisance was established it was in a convenient place, and that the public have come to the nuisance, either by the extension of the town or the opening of highways and streets. This was held to be a defense by some of the early cases, and by one case in Indiana, but the doctrine was long since exploded, and it is now held by all the courts both in this country and England that the fact that the nuisance was originally established in a convenient place, but that the public has come to it, is no defense.³ In the language of PAIGE, J., in *Brady v. Weeks*, 3 Barb. (N. Y. Sup. Ct.), 159, "as the city extends, such nuisances (a slaughter-house) should be removed to the vacant ground beyond the immediate neighborhood of the residences of citizens. This, public policy as well as the health and comfort of the population of the city demand." In *Tipping v. St. Helen Smelting Co.*, 1 Law R. (Eq. Cas.) 66, it appeared that, in 1861, a company was projected for the purpose of carrying on certain copper works near *St. Helen's*, upon property which had been purchased for that purpose in 1859, and upon which the copper works were erected as early as March, 1860. In July, 1860, the plaintiff purchased lands in the immediate

¹ *Cavey v. Ledbitter*, 31 Law J. (Q. B.) 290; *Baniford v. Turnley*, id. 286; *Jones v. Powell*, Palm. 536; *St. Helen Smelting Co. v. Tipping*, 35 Law J. (Q. B.) 66; *Stockport Water Works Co. v. Potter*, 7 H. & N. (Exch.) 160; 31 Law J. (Exch.) 9. The keeping of a dairy in a public place may be a public nuisance, although kept as clean as possible. *State v. Ball*, 59 Mo. 321.
² *Weld v. Hornby*, 7 East, 199; *People v. Cunningham*, 1 Denio (N. Y.), 524;

Dygert v. Schenck, 23 Wend. (N. Y.) 446; *Mills v. Hall*, 9 id. 315.

³ *Smith v. Phillips*, 8 Phila. (Penn.) 10; *Elliotson v. Feetham*, 2 Bing. (N. C.) 134; *Bliss v. Hall*, 5 Scott, 500; *Brady v. Weeks*, 3 Barb. (N. Y. Sup. Ct.) 167; *Taylor v. The People*, 6 Parker's Crim. R. (N. Y.) 347.

neighborhood, knowing of the existence of the copper works. It also appeared that there were also many chemical works in the neighborhood, that emitted large quantities of deleterious vapors. In July, 1863, the plaintiff brought his action against the defendants, and recovered a verdict of £360. The defendants not stopping the business, the plaintiff brought his bill in equity for an injunction. The defendants resisted the granting of the injunction, upon the ground that the plaintiff, when he bought his property, *knew* of the existence of the nuisance, and that he had come to it of his own accord and with full knowledge. Vice-Chancellor Woon held, that the fact that the plaintiff *had come to the nuisance* did not disentitle him to equitable relief, and upon appeal his judgment was unanimously sustained, and this may be regarded as a well-settled rule of law upon this question. See chapter on Private Nuisances. As to indictments and the necessary allegations therein, see chapter on Pleadings.

CHAPTER THIRD.

PURPRESTURES.

SEC. 81. Purprestures defined.

82. Remedies for.

83. No necessity for naming relator.

84. Purpresture may be abated or arrested at the option of the State.

85. Encroachments upon highways.

86. *State v. Woodward*.

87. *Burnham v. Hotchkiss*, and other cases.

88. Purprestures not indictable.

89. Reasons why not indictable.

90. *People v. Vanderbilt*.

91, 92, 93, 94. Advantages of distinction between purprestures and nuisances.

95. *Rex v. Russell*.

96, 97. Right of conservation in the State. Various American cases.

SEC. 81. A purpresture is any encroachment upon real property or rights and easements incident thereto belonging to the public, by an inclosure or erection thereon, which, if made upon

the property of an individual, would be a trespass. Lord Coke says: "A purpresture signifies a close or inclosure, that is, when one encroacheth, and makes that several to himself which ought to be common to many." By the early legal writers the term was used to designate encroachments upon the rights of individuals as well as upon the king; but it is now applied only to encroachments upon lands, or rights and easements therein belonging to the public, and to which the public have a right of access, or of enjoyment, and encroachments upon navigable streams;² or the building of a house upon a public common,³ or inclosing a part of a highway with a fence, or erecting a crib or pier in a navigable stream, or building a bridge, or making any unauthorized erection over a highway.⁴ It was formerly held to be an injury to public rights of the character above described which might be committed against and redressed at the suit of the public, the owner of the fee, or of individuals specially injured.⁵ But as has previously been stated, the term as now used, is applied exclusively to encroachments upon public rights in highways, commons or other lands owned or used by the government or the public, and in navigable streams.⁶

SEC. 82. The remedies for this species of injury were formerly by information of intrusion at common law, or by information at the suit of the attorney-general in equity.⁷ In *Attorney-General v. Richards* (3 Anstruther), 603, which was an information for the erection of a wharf or key, docks and other buildings between high and low-water mark in Portsmouth harbor, it was

¹ 2 Inst. 38, 272; Harg. Law Tracts, 84; Beame's note to Glanville, Book 9, p. 239; Spellman's Glossary, tit. Pourpresture; Skene, tit. Pourpresture; Termes De La Ley, tit. Pourpresture; Bouvier's Inst. In *Attorney-General v. Chamberlain*, 4 K. & J. 292, it is said that any invasion of, or encroachment on, the soil of the sea shore or bed of an estuary or navigable tidal river between high and low-water mark, while the same remains in the crown, is a pourpresture.

² Story's Eq. Juris. 109, § 921; Waterman's Eden on Injunctions, 259; 2 Inst. 38, 272; Woolrych on Waters, Law Lib. fol. 53, p. 193-195; Hart v. The Mayor, etc., 9 Wend. (N. Y.) 571.

³ *People v. Vanderbilt*, 28 N. Y. 396; *Dimmett v. Eskridge*, 6 Munf. 308.

⁴ *Knox v. Mayor, etc.*, 55 Barb. (N. Y. Sup. Ct.) 404.

⁵ Skene, title Pourpresture; Beame's note to Glanville, Book 9, c. 11, p. 239.

⁶ 2 Inst. 38, 272; Spelm. Gloss. Pourpresture; Harg. Law Tr. 84; 3 Kent, 432; *Trustees v. Cowen*, 4 Paige (N. Y.), 510; *Attorney-General v. Forbes*, 2 M. & C. 123; *Commonwealth v. Wright*, 3 Am. Jur. 185; *NO v. United States*, 10 Pet. (U. S.) 623; *Attorney-General v. Cohoes Co.*, 6 Paige's Ch. (N. Y.) 133; *Mohawk B. & Co. v. R. R. Co.*, 6 Paige's Ch. (N. Y.) 554.

⁷ Eden on Injunctions, 259.

held, upon the authority of numerous cases, that an information in equity, at the suit of the attorney-general, would lie to abate it, the crown having title to all ports and avenues of the sea, and to the soil thereof. And it was said in that case that informations of this character had often been brought and sustained, and the court cited as instances where this remedy had been adopted several unreported cases.¹

SEC. 83. Cooper says, on page 102 of his work on Equity Pleading, that although informations in these cases may be and often are filed without naming a relator, yet that there is great propriety in naming a relator in all cases, and that this practice is far more equitable, as in cases where no relator is named, no costs can be recovered by the defendant if he prevails, no matter how improperly or wantonly even the suit may have been brought.² But the practice of naming a relator in informations of this character does not seem to have been generally adopted in the English courts. And in cases of purprestures, there would seem to be evident impropriety in so doing, as the right violated is purely public, and affects the rights of the government, municipal or otherwise, and not in any sense the rights of individuals.³ But where the act complained of is of a mixed character—that is, both a purpresture and a nuisance—the practice would be proper.

SEC. 84. Formerly, if the encroachment was regarded as a purpresture merely, and did not come within the idea of what was then regarded as within the idea of a nuisance, it was the practice to direct an inquiry to be made, whether it would be most beneficial to have the purpresture abated or to allow it to remain and be arrented.⁴ But where the encroachment was re-

¹ Story's Eq. Juris., vol. 2, p. 122, § 922.

² Attorney-General v. Philpot, in Exchequer, 8 Car. 1; Churchman v. Tunstall, and City of Bristol v. Morgan, cited in Hale's Treatise, 81. See, also, Anonymous, 3 Atk. 750; id. 21; Ryder v. Bencham, 1 Ves. 548; Anonymous, 2 id. 193; 1 Harg. Jurid. Tr. 471.

³ Attorney-General v. Fox, Redf. Tr. Ch. Pl. 23 n. It is only when the rights of persons are also affected that they can be made parties with the attorney-general in such cases. Barnes

v. Baker, Ambler, 158; Attorney-General v. Cleaver, 18 Ves. 211; Spencer v. Railroad Co., 18 Sim. 193; Attorney-General v. Forbes, 2 M. & C. 123; Sanborn v. Smith, 18 Sim. 272. Birch v. Halt, 3 Atk. 726.

⁴ Waterman's Eden on Injunctions, 260; Rede's Tracts, 117; Mitford's Eq. Pl. 145; Attorney-General v. Richards, 2 Anst. 603; Attorney-General v. Johnson, 2 Williams' Ch. 101; Rex v. Earl Grosvenor, Starkie's N. P. 187; Gann v. The Free Fishers of Whitstable, 11 H. L. 192.

garded as a public nuisance, it was abated, for the reason that even the crown could not sustain a public nuisance.¹ Therefore, a purpresture, strictly, is an encroachment upon a public right in lands or navigable streams, that does not operate as an obstruction or injury to individual members of the public, but only to some right incident and peculiar to it in its aggregate capacity as such. The distinction between nuisances and purprestures is really broad, although at first thought there may appear to be no material difference, and courts have very often fallen into grave errors from a failure to observe the real boundaries between the two.

SEC. 85. As an illustration of the true distinction, we will state the case of an encroachment upon a highway. Now, so far as the public, in its aggregate capacity, is concerned, it has a right to the free and unobstructed use of all the land embraced within the limits of the highway in its entire length and breadth, and has a right to have the same at all times, and to its entire extent, kept free from all encroachments or obstructions, but it is not every encroachment upon a highway that amounts to a nuisance.² Strictly speaking, no interference with a highway, that does not operate as an obstruction to public travel, comes within the idea of a nuisance, or is so regarded, and as to what in fact does constitute a nuisance thereto is to be judged of and passed upon by a jury.³ If a man dig the turf within the actual limits of a highway, but does not thereby in any measure obstruct the exercise of the right of passage over the highway by individuals, it is not in law or in fact a nuisance, because it does not injuriously affect the rights of individual members of the public; but as to the public itself, in its aggregate capacity, it is an invasion of its right, it is a trespass upon its lands—in other words, it is a purpresture, and may be redressed in an action both by the public and the owner of the fee. The public acquires no more than an easement in its highways, a right of way over the same, with all the powers and privileges incident thereto, which includes the

¹ Ibid. *M. & M. R. Co. v. Ward*,
2 Black (U. S.), 485.

² *Attorney-General v. Parmeter*, 10
Price, 378; *Attorney-General v. Bur-*

ridge, id. 350; *Regina v. Randall*, 1
Car. & M. 496.

³ *Burnham v. Hotchkiss*, 14 Conn.
167.

right of digging the soil, cutting and using the timber within the limits of the highway for the purpose of repairing its roads and bridges, exercising that right in a reasonable way. The public does not take the fee of the land, nor extinguish the title of the original owner. Nothing but an easement, with its legitimate incidents, passes to the public. The original owner or his grantee retains the exclusive right to all mines, timber and the soil, so far as the same is not inconsistent with the right of way, and keeping the way in proper repair and condition. The owner of the fee may maintain ejectment, trespass or waste for an injury to his reversionary interest.¹ Therefore, the public, in its aggregate capacity as a town, city, county or State, may and does acquire rights over the lands embraced within the limits of its highways that are peculiar to itself, and that may not lawfully be exercised by individual members of the public. It is encroachments upon or injuries to those peculiar rights that are regarded as purprestures. It is sometimes difficult to draw the line of distinction between purprestures and nuisances, and for this reason courts have always recognized purprestures as comprising two classes, those that are purprestures strictly, and those that amount to a nuisance. The equity and reasonableness of this is evident, and the practice adopted by the courts at an early period, of directing an inquiry as to whether an encroachment was in fact a nuisance or only a purpresture, and retaining the suit and entering judgment therein in either event, is consistent with the high appreciation in which the courts then held the rights of parties seeking its judicial aid. Whether an encroachment upon a public right is a nuisance or only a purpresture, it is the right of the public to have it abated if it so elects; but if it is not a nuisance, but simply an infringement upon a right, it may if it so elects, or, if in the judgment of the court the public interest requires it, permit the encroachment to remain, subject to such conditions as the public may impose. But if it is regarded as a nuisance, there is no power, except that of the legislature, that can lawfully authorize its continuance. Thus, it will be seen that this distinction between this class of injuries was created by the courts, out of

¹ *Adams v. Rivers*, 11 Barb. (N. Y.) 447. *Johns. (N. Y.)* 447. *S. C.* 396; *Jackson v. Hathaway*, 15

that careful regard that they entertained for both the rights of the sovereign and the public. The true grounds for the distinction are well expressed in *De Jure Maris*, Hargrave's Law Tracts, 85, thus: "It is not every building below the high-water mark, nor every building below the low-water mark, that is *ipso facto* in law a nuisance; for that would destroy all the quays that there are in all the ports in England, for they are all built below high-water mark, for otherwise vessels could not come at them to unlade; and some are built below low-water mark, and it would be impossible for the king to license the building of a new wharf or quay, whereof there are a thousand instances, if *ipso facto* it were a common nuisance because it straitens the port, for the king cannot license a common nuisance. Indeed, where the soil is the king's, the building below the high-water mark is a purpresture, an encroachment and intrusion upon the king's soil, which he may either demolish, or seize, or arrent at his pleasure; but it is not *ipso facto* a common nuisance, unless indeed it be a damage to the port and navigation." With reference to the sea, and the arms thereof and navigable streams generally, the rule is, that the land between high and low-water mark belongs to the State, and that an occupancy or appropriation of the land between those points is not *ipso facto* a nuisance, but is a purpresture, purely, which the State may abate, or seize and arrent at its election. Thus, in *Blundell v. Catterall* (5 Barn. & Adol. 268; 7 Eng. Com. Law, 21), which was an action of trespass for entering upon premises over which the plaintiff claimed title as lord of the manor called the Sea-Shore, within the manor of Great Crossly, and between high and low-water mark of the river Mersey, with horses, carts and other carriages doing damage to the soil thereof, the defendant set up in defense that the public had a right of way over the premises between high and low-water mark of the stream in question, and also a custom under which those rights had been exercised by the public. The plaintiff took issue. It appeared that the defendant was a servant at a hotel erected in 1815 upon land in Great Crosly, and the proprietor of the hotel kept bathing machines for the use of persons resorting there, and the defendant had charge of the same, and that the alleged trespasses were committed while passing over the

premises with the machines and guests of the hotel to reach the sea for the purpose of bathing. The defendant insisted that any person had a right, not only to bathe in the sea, but also to pass over the soil of a navigable stream, between high and low-water mark, for the purpose of reaching it for that purpose. The case was tried at the Lancaster Assizes before BAYLEY, J., and there was a verdict for the defendant, and it was heard in King's Bench, at the Easter term, on exceptions, when the judgment below was affirmed, and, among other things, HOLBOYD, J., said: "The king's subjects have not a right of using and appropriating the soil of the sea-shore, or of the sea itself, as they please, even where the soil remains the king's, clothed with the *jus publicum*, and where that use or appropriation is effected in such a manner as not to be a nuisance to the public rights of others." And BAYLEY, J., says: "When an erection is made on the sea-shore without authority, the crown may treat it as a purpresture, and prosecute it accordingly; but it has never yet been held abatable or indictable, because it happens to interfere with the supposed common-law right of bathing." In this country, purprestures have usually been treated as public nuisances, and no distinction made between encroachments upon public rights, amounting simply to purprestures, and those which are nuisances, particularly so far as highways, navigable streams and public commons are concerned. In the case of *Burnham v. Hotchkiss* (14 Conn. 318), which was an action of trespass for removing a fence standing within the actual limits of a highway, but not so as in any wise to obstruct public travel, WILLIAMS, J., says: "The jury were told that if the wall was in the highway, and the public travel was thereby actually obstructed, hindered or endangered, the defendants were justified. The case has been argued before us as if the judge had told the jury that the obstruction must be in the traveled path; and to show the law to be otherwise, the case of the *Commonwealth v. Wilkinson* (16 Pick. 175) is cited. Lord COKE also tells us, that a purpresture or unlawful inclosure is properly where there is a house builded on or an inclosure made of any part of the king's domain, or of a highway or a common street. Co. Lit. 38-272. And when the court in this case spoke of the public highway being obstructed, it did not speak of the

traveled path, but of an obstruction on any part of the land devoted to the public for a highway. It is said that the court should have instructed the jury, as a matter of law, that if they found this wall and these boards were over the line of the highway, whether one foot or one inch, it was a nuisance, without reference to any other facts tending to qualify the act. But supposing this wall was built upon the edge of a precipice on the side of the road, securing the traveler from imminent danger, but in some slight degree encroaching upon the highway, were the court bound, as a matter of law, to declare it a nuisance? A tree or a post in a highway is *prima facie* a nuisance; but upon the principle before adverted to, the question of nuisance in the particular case is for the jury, and we see no solid ground for distinction in this case." In this case, the court adverted to the doctrine of purprestures, as laid down by Lord Coke, and recognized its force, and while it did not in terms apply it to the case in hand, yet it did so in effect. Clearly, the jury having found that the fence was not a nuisance, it being within the limits of a highway, and inclosing a part of it, it was simply a purpresture, which the public, in its municipal capacity, could alone cause to be abated. So in the case referred to by the learned judge in reference to the wall along the edge of a precipice, but within the limits of a highway, if it is not a nuisance *per se*, it would be a purpresture simply, which the public could tolerate and permit to remain; but if a nuisance, even the public would not be at liberty to tolerate it.

SEC. 86. But in the case of *State v. Woodard*, 23 Vt. 92, which was an indictment for an erection upon lands devoted to public use, the court say: "When the act complained of is the taking of property devoted to public use, and applying it to his own use, the respondent is not entitled to have the question, as to whether the erection is a nuisance, submitted to the jury. Such an act is a nuisance in law, for the commission of which there can be no justification." Also in a later case in Vermont, that of *State v. Atkinson*, 28 Vt. 448, the court held a similar view, thus ignoring the distinction between nuisances and purprestures, and holding that all encroachments upon a highway are *per se* a pub-

lic nuisance. In the case of *Commonwealth v. Wilkinson*, 16 Pick. Mass. 175, a similar doctrine is held.

SEC. 87. In the dissenting opinion of WATTE, J., in the case of *Burnham v. Hotchkiss*, that learned judge says: "All such erections in a highway, whether in the place used for travel or not, are nuisances." This, clearly in principle, is supported by many of the cases. Thus, in *Commonwealth v. Church*, 1 Burr. Penn. 105, it was held, that the erection of a dam in a stream which is a highway, is *prima facie* an indictable offense at common law, whether an actual obstruction or not. In *Brownlow v. Tomlinson*, 1 M. & G. 484, it was held, that any narrowing of a public highway is a nuisance, but that owing to the difficulty of determining sometimes how far the highway extends, as where it runs across a common, or where there is a hedge on only one side of the way, or where there are hedges on both sides, the space is much larger than what is necessary for the use of the public, in these cases it would be for the jury to say how far the way extends.

SEC. 88. In *Rex v. Wright*, 3 Barn. & Adol. 681, Lord TENTERDEN said: "I am strongly of opinion, that when I see a space of fifty or sixty feet through which a road passes between inclosures set out by an act of parliament, that, unless the contrary appear, the public are entitled to the whole of that space, although, perhaps from economy, the whole may not have been kept in repair. If it were once held that only the middle part which carriages ordinarily run upon was the road, you might by degrees inclose up to it, so that there would not be room left for two carriages to pass. The space at the sides is also necessary to afford the benefit of the air and sun. If trees and hedges might be brought close up to the part actually used as the road, it could not be kept sound." For a full review of authorities, so far as highways are concerned, see the chapter on Highways, *infra*. But it is an error to hold one criminally chargeable for a mere trespass upon public property, which produces no annoyance, hindrance or obstruction to the exercise of such rights as it is devoted to by the public. Take, for example, the instance of a lot purchased and owned by a town or city, for the purpose of

erecting public buildings thereon, and upon which public buildings are erected to which each individual member of the public is entitled to access. If a person owning an adjoining lot should extend his fence so as to embrace and inclose two feet of this land, would it be a public nuisance and indictable as such, or would it come at all within the idea of a nuisance? Most certainly not, because it does not hinder or obstruct the exercise of those rights to which individual members of the public are entitled, and does not arise from the improper use of the offender's own property. It is a mere encroachment, a trespass, that comes clearly within the idea of a purpresture, and is not indictable at common law.¹ A purpresture, purely, is not indictable; but when an encroachment is both a purpresture and a nuisance, it is indictable, abatable and punishable as for a nuisance.² The remedy for a purpresture, simply, is by information in equity at the suit of the attorney-general or other proper officer.³

SEC. 89. The reason why a purpresture is not indictable unless it is also a nuisance is because it does not operate as an obstruction to the exercise of individual, but only to those rights that are incident to the public in its aggregate or municipal capacity. The idea cannot be better expressed than was done by PARK, J., in *Rex v. Carlisle*, 6 Carr. & Payne, 636, he says: "No doubt if a man does an act which injures a particular neighbor, he is not liable to be indicted if no one else but that neighbor is injured; but if a place is situated near a highway, and the defendant does that which causes the person passing to be prevented from passing as they ought to do, and besides this, people are annoyed in the occupation of their houses, this is a nuisance for which the party is indictable. There is no doubt but that a

¹ *People v. Vanderbilt*, 28 N. Y. 376; *Davis v. Mayor*, 14 id. 526; *Attorney-General v. Richards*, 2 Anstruther, 603.

² *People v. Cunningham*, 1 Denio, 524; *Rex v. Carlisle*, 6 C. & P. 636; *Rex v. Jones*, 3 Camp. 230; *The King v. Russell*, 6 East, 427; *Hoffmann v. Schultz*, 31 How. Pr. (N. Y.) 385; *Weil v. Schultz*, 33 id. 7; *Peckham v. Henderson*, 27 Barb. (N. Y. S. C.) 207; *Harrower v. Ritson*, 37 id. 301; *Walker v. Caywood*, 31 N. Y. 64.

³ *People v. Vanderbilt*, 28 N. Y. 376; *Watertown v. Cowen*, 4 Paige's Ch. (N. Y.) 510; *Commonwealth v. Wright*, 3 Am. Jurist, 185; *New Orleans v. United States*, 10 Pet. 662; *Attorney-General v. Forbes*, 2 Mylne & C. 123; *Ripon v. Hobart*, 3 id. 169; *Mohawk Bridge Co. v. Railroad Co.*, 6 Paige's Ch. (N. Y.) 554; *Attorney-General v. Cohoes Co.*, 6 Paige's Ch. (N. Y.) 135.

tradesman may expose his wares for sale ; but he must do it in such a way as not, by so doing, to cause obstruction in the public street."

SEC. 90. In the case of *The People v. Vanderbilt*, 28 N. Y. 396, which was an action brought by the attorney-general to restrain the defendant from enlarging a crib or pier known as pier No. 1 in the North river adjoining the battery in New York city, the defendant claimed that he was authorized to construct the pier by the proper authority of the city of New York, and this authority was proved upon the trial. But the court say "the mayor and common council of the city of New York had no authority to grant the defendant such permission. It has been held in England that a legal grant from the crown cannot make an erection in a public river for private purposes legitimate, and that the right of the public to the unobstructed use of navigable waters is paramount to any right of property in the crown. *

* * The defendant sunk the crib and was constructing the proposed pier further into the waters of the bay and North river than any one could erect one by virtue of the act of 1857. The defendant cannot avoid liability for what he did, and intended to do, on the ground that the proof does not show that the people sustained, or would sustain any actual damages by the crib or proposed pier. * * * The crib sunk by the defendant and the proposed pier are a purpresture and *per se* a public nuisance. Therefore the offer of the defendant's counsel to prove that they were not, and would not be an actual nuisance, and would not interfere with or effect the navigation of the river or bay, was properly denied. The remedy to prevent the erection of a purpresture and nuisance in a bay or navigable river is by injunction at the suit of the attorney-general." The court, also, upon authority of the case of *Attorney-General v. Richards*, 2 Anstr. 603, rendered judgment that the defendant be restrained from erecting the proposed pier and other erections, and that he remove the crib within thirty days after service upon him of a copy of the judgment.¹

¹ See the following cases: *Attorney-General v. Forbes*, 2 M. & C. 129; *Swans*, 335; *Railroad Co. v. Artcher*, 6 Attorney-General v. Johnson, 2 Wil- son's Ch. 101; *Wynsterly v. Lee*, 2 Paige's Ch. (N. Y.) 83; *Attorney-Gen-*

SEC. 91. The advantage of this distinction between purprestures simply, and purprestures amounting to a nuisance, arises from the fact that the public cannot permit or maintain a nuisance any more than an individual, even though it is really a matter of public benefit;¹ but if it is merely a purpresture, the courts have power to direct that the erection be permitted to remain and be arrented by the public.² In England, the title to the shores of the sea, as well as arms of the sea, is in the king; and in this country the title is in the State,³ and, consequently, every intrusion thereon, whether it affects navigation or not, is a purpresture, and may be abated by the king or the State.⁴ Therefore the king or the State may permit any erections that do not interfere with navigation, and the license thus given will be a complete protection, so long as navigation is not interfered with; but if navigation is in any wise impeded, or the erections made go beyond low-water mark, the license is no protection, for neither the crown nor the State can license a public nuisance.⁵ If a person takes possession of, and makes an erection of any kind between high and low-water mark on the sea-shore, this erection is not *per se* a nuisance; but it *is* a purpresture, which the State may seize and demolish, or arrent at its pleasure.⁶

SEC. 92 This distinction between nuisances and purprestures is indispensable to the healthy growth of commerce, and the convenience and protection of public interests. Lord HALE well

eral v. Philpot, 8 Car., cited 2 Anstr. 603; City of Bristol v. Morgan, cited Harg. Law. Tr. 81; Town of Newcastle v. Johnson, id.; Bristol Harbor Case, 18 Ves. 214; Attorney-General v. Forbes, 2 Myl. & Cr. 123; Rex v. Grosvenor, 2 Stark. N. P. C. 511; Jacob Hall's Case, 1 Vent. 169; Rex v. Basterton, 6 Mod. 143; but see Rex v. Justices of Dorset, 15 East, 574; Attorney-General v. Parmenter, 10 Price (Exchq.), 378; Attorney-General v. Burridge, 10 id. 350; Attorney-General v. Cleaver, 18 Ves. 217; Earl of Ripon v. Hobart, 3 M. & C. 169; Crowder v. Tinkler, 19 Ves 620; Barnes v. Baker, Amb. 158; Mowhawk Bridge Co. v. R. R. Co., 6 Paige (N. Y. Ch.), 554; Attorney-General v. Cohoes Co., id. 133; Trustees of Watertown v. Cowen, 4 id. 510; Georgetown v. Alexandria Bridge

Co., 12 Pet. (U. S.) 91; Corning v. Lowerre, 2 Johns. (N. Y. Ch.) 439.

¹ Republic v. Caldwell, 1 Dall. 167; Gann v. Free Fishers of Whitstable, 11 H. L. 192.

² Attorney-General v. Richards, 2 Anst. 606; Reede's Tr. 117; 2 Waterman's Eden on Injunctions, 260.

³ Angell on Tide Waters, 200; Houck on Navigable Rivers, 198.

⁴ Coke's Inst. 38; Angell on Tide Waters, 198.

⁵ Coke's Inst. 38; Gann v. Free Fishers, 11 H. L. 192; Kerr on Injunctions, 396.

⁶ *De Jure Maris*, 84; Attorney-General v. Richards, 2 Anstr. 603; Attorney-General v. Johnson, 2 Wilson's Ch. 101; Angell on Tide Waters, 201.

says in his "*De Jure Maris*": "It is not every building below the high-water mark, nor every building below the low-water mark that is *ipso facto* in law a nuisance; *for that would destroy all the keys that are in all the ports in England; for they are all built below the low-water mark.* Thus it will be seen that even in Lord HALE's time, when the commerce of England was in its infancy, comparatively, the distinction between encroachments upon navigable streams and actual obstructions of navigation was rendered indispensable to save the commercial interests of the country from positive destruction. So, too, in this country, a rigid application of the law of nuisances to encroachments upon navigable waters, would result in involving nearly every seaport town in the country in the most serious disaster. According to the strict rules of the common law, all waters in which the tide ebbs and flows are navigable and public, but which are really of no value for the purposes of navigation without the expenditure of vast sums of money, and often the exercise of the highest skill and most persistent industry. The waters of the sea under the throes of the tides are often sent for considerable distances over the low, marshy lands that are upon its borders, but recede again with the tide, and practically, can be said to form no part of the sea itself, and are of no value to, but generally, are really a detriment to navigation. These lands by the common law are regarded as a part of the sea itself, and navigable, so that their appropriation for any purpose that in any measure, even slightly, interfered with the flow of water there, would be regarded as a public nuisance. But, practically, it has been demonstrated that the reclaiming of these lands by individuals, and their appropriation for private purposes by the erection of embankments that confine the waters within proper limits, are really an advantage to the public, and greatly enhance the interests and convenience of navigation by providing suitable and safe landing places and wharves for the loading and unloading of vessels, and the laying out of new streets and thoroughfares for the accommodation and advantage of commerce.

SEC. 93. A very large portion of many of our seaport towns is built upon land thus reclaimed from the sea. Many of our best

harbors have been made so by the enterprise of individuals in the construction of strong embankments in the very heart of these "wastes," and rendering them strong and secure by filling the void behind them with acres of firm, hard soil, upon which busy streets lined with warehouses, and thousands of avenues for trade and commerce are erected, and thus not only really enhancing the advantages of navigation by providing suitable channels therefor, but also by providing wharves and easy access to the vessels that seek the port. In *Pollard's Lessees v. Hagan*, 3 How. U. S. 212, CATRON, J., in commenting upon this subject, says: "It is a practical truth that the mud flats in the delta of the Mississippi and around the Gulf of Mexico, formed of rich deposits, have no connection with navigation, but obstruct it, and *must* be reclaimed for the *furtherance* of navigation. This is well illustrated by the recent history of Mobile. When the act of 1824 was passed, giving to the corporation the front of the city, it was excluded from the navigable channel of the river by a mud flat, slightly covered with water at high tide, of perhaps a thousand feet wide. This had to be filled up before the city could prosper, and, of course, by individual enterprise, as the vacant space, as was apparent, must become city property; and it is now formed into squares and streets, having wharves and warehouses. The squares are built up, and the fact that that part of the city stands on land once subject to the ebb and flow of the tide will soon be a matter of history. At New Orleans and most other places fronting rivers where the tide ebbs and flows, as well as on the ocean and great lakes, navigation is *facilitated* by similar means. Without their employment few city fronts could be formed at all adapted to navigation and trade." So, too, in Boston, many of its most important commercial streets are built upon lands thus made, and its railroads are constructed and run in various directions over lands washed by the waters of the sea, until reclaimed by the enterprise of individuals and corporations.

SEC. 94. Thus it will be seen that the law has been compelled to yield somewhat to the stern necessities of communities, and to provide an avenue of escape from positive destruction of those ports which have encroached upon the sea, but have not actually

obstructed the navigation thereof. This avenue of escape has been furnished by classing such encroachments under the head of *purprestures*, and recognizing a broad distinction between them and actual obstructions to navigation. The same distinction is recognized by the civil law,¹ and any person is allowed to improve, repair and strengthen the banks of the sea, *provided* navigation is not thereby impeded. If a person fills in upon the borders of the sea and makes land there, any one who is thereby *injured*, may have the *interdictum utile*; but if no injury is inflicted, he who builds upon the sea shore, or converts its waste marshes into *terra firma*, is protected and upheld in his enterprise. By the common law the title to the soil of the sea in England is in the king, and, in this country, in the State, so that all persons who reclaim tide-waters do so as intruders, and are at the peril of being dispossessed by writs of intrusion. But in this age of enlightenment citizens can safely rely on the forbearance of the government against molestation when, by their industry and enterprise, they have done that which redounds to the public good, even though they have technically trespassed upon public rights. But if these acts result in *obstructing* navigation even slightly, it is a public nuisance, and liable to indictment and abatement as such. But as to whether such an encroachment is a nuisance, is always a question of fact to be determined by the jury, and not a question of law.² Where there is an actual obstruction of navigation, it is no defense that the encroachment complained of is really a public benefit, or that it serves a useful end in furthering the interests of navigation. But a slight, uncertain injury to navigation, depending upon contingencies which may or may not occur, is not regarded as sufficient to sustain an indictment.³

SEC. 95. In *Rex v. Russell*, 6 B. & C. 566, the defendant was indicted for erecting coal staiths in the river Medina. The staiths were erected under a license from the mayor and burgesses of Newcastle, in whom the crown had vested the right of conservation. The defendant set up this license in defense of the

¹ Digest, L. 43, t. 15, § 1.

² *Rex v. Ward*, 4 Ad. & El. 384.

³ Hale's *De Jure Maris*, Harg. Tracts, 85.

indictment. But the court held that the license afforded no protection when the act done under it amounted to a nuisance.

SEC. 96 While the crown has the right of property, and of conservation of a navigable stream, and may transfer and separate them, and confer the right of conservation on a city within the ebb and flow of the tide, yet this does not confer upon the city the title to the soil of the river, and even if it did, neither the ownership of the soil nor the license of conservation would be sufficient to legalize an erection that in any measure impedes navigation.¹ Neither would the fact that the erection complained of really benefited navigation by providing a deeper and better channel, so that vessels of heavier draft could come into the harbor be of any avail by way of defense.²

SEC. 97. This doctrine, as to the division of public rights in navigable streams and the right of conservation, has been frequently recognized by the courts of this country, and is of the highest practical advantage and importance to the people and its business interests. Most of the great public improvements made in our seaport towns and upon the banks of our navigable lakes and streams, are the result of individual effort and enterprise. If such improvements were dependent upon the action of the government, great delay and embarrassment would result, and the growth and development of towns and cities would be greatly retarded. But, with the power in the State to permit individuals and corporations to make these improvements, this difficulty is obviated, and individual effort and enterprise accomplishes in a brief time that which might otherwise be delayed for indefinite periods, to the serious loss not only of communities, but the entire country.

In *United States v. Fanning*,³ Morris, 348, it was held that the State might grant an individual a right of ferry over the

¹ *Rex v. Russell*, 4 Ad. & El. 384; *Regina v. Randall*, 1 C. & M. 496.

² *Rex v. Russell*, 6 Ad. & El. 143; *Rex v. Lord Grovernor*, 2 Starkie, 511; *Folkes v. Chad*, 3 Doug. 340; *Respublica v. Caldwell*, 1 Dallas (U. S.), 150

³ See also U. S. v. Bedford Bridge Co., 1 W. & M. (U. S.) 412; *Silliman v. Hudson River B. Co.*, 4 Bl. (U. S. C. C.)

395; 2 Wall. (U. S.) 403; *Works v. Junction Railroad*, 5 McL. (U. S.) 425; *Jolly v. Terra Haute Br. Co.*, 6 id. 237; *Atkinson v. Philadelphia and Trenton R. R. Co.*, 14 Haz. 10; *Columbus Insurance Co. v. Curtinas*, 6 McL. (U. S.) 209; *Avery v. Fox*, 1 Abb. (C. U. S.) 246; *Northwestern Union Packet Co. v. Allen*, 7 Am. L. R. 752.

Mississippi river, but *that it could not grant a right that would result in the obstruction of navigation.*

In *Woodman v. Kilburn Manufacturing Co.*, 1 Abb. (U. S. C. C.) 158, it was held that a State might authorize an individual or corporation to divert a portion of the waters of a navigable stream, but not when such diversion would impede or injure the navigability of the stream.

In *Columbus Ins. Co. v. Peoria Bridge Association*, 6 McL. (U. S.) 70, it was held that the State might authorize the erection of a bridge over a navigable stream, but that the State has the power to revoke the authority if it operates as an obstruction to navigation, *and* when the obstruction created by the bridge overbalances the benefits derived therefrom by the public, the United States courts will restrain its maintenance.¹

A State has no right to grant authority that will obstruct and impede navigation to an essential degree, even though it be only of a *tributary* merely to a great navigable river.²

While, at the close of the revolution, the people of each State, in their sovereign capacity, acquired the absolute right to all navigable waters and the soil under them,³ yet where the State has permitted a use of navigable waters connecting two States that interferes with navigation, the general government, under the power given it by the Constitution to regulate commerce between the States, may exercise jurisdiction over the waters, and procure an abatement of such obstructions.⁴ But in order to warrant the intervention of the government, the obstruction must be of such a character that the injury resulting from it overrides the benefits accruing to the public therefrom.⁵ Thus it will be seen that, while the State may tolerate purprestures, it cannot license or protect an actual public nuisance upon its navigable streams.

Wharves and piers may be erected even below low-water

¹ *Devoe v. Penrose Ferry Bridge Co.*, 3 Am. L. R. 19.

² *Jolly v. Terra Haute Br. Co.*, 6 McL. (U. S.) 237; *Columbus Ins. Co. v. Curtinas*, 6 McL. 207.

³ *Martin v. Waddell*, 16 Pet. (U. S.) 30; *Russell v. Jersey Co.*, 15 How. (U. S.) 426; *Bennett v. Baggs, Baldwin* (U. S.), 60.

⁴ *The Daniel Ball*, 10 Wall. (U. S.) 557; *The Montello*, 11 id. 411; *Avery v. Fox*, 1 Abb. (U. S. C. C.) 246; *Jolly v. Terra Haute Br. Co.*, 6 McL. (U. S.) 237; *Columbus Ins. Co. v. Curtinas*, id. 207.

⁵ *Columbus Ins. Co. v. Peoria Bridge Co.*, id. 270.

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mark where they do not obstruct navigation, but they are purprestures, and may be taken by the State or enjoined, in its discretion, or the builder may be permitted to use it.¹ In Massachusetts, by the ordinance 1641, the common law was altered as to that colony so that all proprietors adjoining the sea were vested with the title to the soil to low-water mark, where the tide did not ebb and flow to a distance of more than *one hundred rods* from high-water mark, but not beyond that distance, where the tide ebbed beyond that point.² This ordinance was afterward annulled, but the courts have ever since upheld the right as a *usage* having all the force of a local common law.³ And this ordinance has been assumed and acted upon as a settled rule in Maine as well as in Massachusetts.⁴ So, too, in these States, under this ordinance and the usage that has grown up under it, it is the ebb of the tide, where, from natural causes, it ebbs the lowest, and not the average or common tide, which is to be taken as low-water mark.⁵ I have referred to this local custom, or rather common law, in these States, in this place, not so much because it is german to this subject, but in order that the reader, in examining authorities upon these questions in those States, might do it understandingly. In Connecticut, Pennsylvania, Rhode Island and New Jersey similar local customs exist, under which the courts have upheld the rights of riparian owners to wharf out to low-water mark,⁶ and it seems that in Rhode Island this right existed by virtue of an act passed in 1707 in the reign of Queen Anne, which is among the State records, and the existence of which was not generally known. Angell, in his work on Tide Waters, p. 237, gives the act in full. But the rights of riparian owners to build wharves and otherwise intermeddle with navigable streams, is fully discussed in the chapter on Navigable Streams, and we will pursue the matter no farther here.

¹ Eden on Injunctions, 260; Commonwealth v. Crowningshield, 2 Dane's Abr. 697.

² Gray v. Bartlett, 20 Pick. (Mass.) 186; Storer v. Freeman, 6 Mass. 435.

³ Sale v. Pratt, 19 Pick. (Mass.) 191; Austin v. Carter, 1 Mass. 231; Barker v. Bates 19 Pick. (Mass.) 255; Commonwealth v. Charlestown, 1 id. 186; Angell on Tide Waters, 225, 226.

⁴ Moore v. Griffin, 9 Shep. (Me.) 350;

Lapish v. Bangor Bank, 8 Greenl. (Me.) 85; Emerson v. Taylor, 9 id. 43.

⁵ Stover v. Freeman, 1 Mass. 231; Sparhawk v. Bullard, 1 Metc. (Mass.) 95; Angell on Tide Waters, 226, 227.

⁶ Chapman v. Kimball, 9 Conn. 168; East Haven v. Hemingway, 7 id. 186; Hart v. Hill, 1 Whart. (Penn.) 131; Ball v. Slack, 2 id. 539; Commonwealth v. Shaw, 14 Tr. R. (Penn.) 13; Martin v. Waddell.

CHAPTER FOURTH.

PRIVATE NUISANCES.

- SEC. 98, 99. Right of dominion in owner of the soil.
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101. No actual damage necessary to sustain an action.
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103. Such nuisance may be abated before damage is done, but see distinction in *Norrice v. Baker*.
104. Generally nuisance cannot be abated until it actually exists. Exceptions to the rule.
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106. Such erections are injuries to the right of another.
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109. Rule in *Thomas v. Kenyon*.
110. Kind of projections that create nuisances.
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112. Trees whose branches project over another's land, nuisances, when.
113. Insecure building a nuisance.
114. Duty of owners as to gutters, etc.
115. Duty as to dangerous uses of property.
116. Liability for escape of water brought upon one's premises.
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118. Rule as to cesspools, sewers, etc. *Alston v. Grant*.
119. Distinction between natural and artificial causes of injury.
120. Liability for setting back water by dam or otherwise.
121. Person not bound to drain his land.
122. House owner is bound to prevent injury to his neighbor by reason of his erection.
123. Rule in *Wilson v. City of New Bedford*.
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125. Rule as to occupants of different floors of the same building. *Ross v. Fedden*.
126. Liability of landlord to tenant for nuisances.
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- SEC. 136. Spring guns in dwellings or stores.
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 140, 141. Who liable for maintaining ruinous house.
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 143. Nuisances arising from force or fraud.
 144. Rule in *Grady v. Walsner*.
 145. Negligent acts creating nuisances.
 146. Same continued.
 147. Negligence in suffering dangerous animals to go at large.
 148. Diseased animals, when nuisances.
 149, 150. Negligence as to fire.
 151. Rule in *League v. Journey*.
 152, 153. Ancient lights and private ways.

SEC. 98. The right of every person to exercise full dominion over his own land, to the exclusion of every one else, is among the earliest rights recognized by the courts. This is understood, of course, subject to the qualification that the exercise of this right does not conflict with the exercise of a similar right by his neighbors, and is not of such a character as to produce an injury to the legal rights of others.¹ This dominion extends not merely over the surface of the soil, but to every thing beneath it and every thing above it. "*Cujus est solum, ejus est usque ad coelum*" is the maxim that expresses the right in its full length and breadth.

SEC. 99. Therefore it has been held that the owner of the soil owns all minerals beneath it,² all the water with which the soil is charged,³ and has the sole and exclusive property in every thing beneath the surface of the soil covered by his title. And, while he has no exclusive property in the air, yet he has the right to have it diffused over his land free and pure and uncontaminated by any foreign substance, gases or vapors, that tend either to the destruction of property, health or comfort.⁴ In other words,

¹ *Barnes v. Hathorn*, 54 Me. 40.

² *Marvin v. Brewster Iron Co.*, 55 N. Y. 509.

³ *Chasemore v. Richards*, 2 H. & N. 515.

⁴ *St. Helen Smelting Co. v. Tipping*,

4 B. & S. 608; 12 L. T. (N. S.) 776; 116 E. C. L. 608; *Tenant v. Hamilton*, 7 Clark & Finnelly, 122; *Broadbent v. Impl. Gas Co.*, 4 De G. J. & S. 211; *Walter v. Selfe*, 4 Eng. L. & Eq. 15; *Luscombe v. Steare*, 17 L. T. (N. S.) 229;

against all the world, he has the full and unqualified dominion over all the space above his lands, and every interference with that right is as much a nuisance, and actionable, as an injury to the soil itself.

SEC. 100. It is in pursuance of this right of dominion, and in recognition of it, that it is held that no person has a right to make any erection upon his own land, that projects over the land of his neighbor. The erection of a house or building of any kind by one land owner, so that the eaves thereof overhang the land of another, is a nuisance, and an action lies therefor even though no special injury results therefrom.¹

SEC. 101. Thus in *Fry v. Prentice*, 14 L. T. (N. S.) 298, the court say, "that in a declaration for an injury for the erection of a building by an adjoining land owner so that its eaves project over the land of another, it need not be stated that any special damage has been done, for it is an injury to a right, and the law will presume that rain will fall, and after the lapse of a reasonable time will presume that it has fallen. This was an action on the case for erecting a house with a cornice, projecting over the lands of the plaintiff, by means of which quantities of rain fell from the cornice upon the plaintiff's garden and did damage, and by

Roberts v. Clarke, 18 id. 264; *Catlin v. Valentine*, 9 Paige's Ch. (N. Y.) 575; *State v. McConathy*, 11 Mis. 517; *Watson v. Gas-Light Co.*, 1 N. C. 262; *Pentland v. Henderson*, 27 Jur. 241; *Ward v. Lany*, 35 id. 408; *Simpson v. Smith*, 8 Sim. 262; *Houghton v. Bankhardt*, 3 L. T. (N. S.) 266; *Barnes v. Ackroyd*, 26 id. 622.

¹ In *Tucker v. Newman*, 11 Ad. & El. 40, it was held that the building of a roof so as to overhang the lands of another, or the discharge of rain-water therefrom upon adjoining lands by means of a spout was an actionable nuisance, but the action being in the name of the owner of the reversion, so far as the spout was concerned, Mr. Justice PATTERSON left it for the jury to say whether there was damage to the reversion, instructing them that in this case, as in that of *Baxter v. Taylor*, 4 B. & Ad. 72, the act was no injury in itself, but is actionable, as if continued

it would result in establishing a right to discharge the water there. In *Clark v. Reynolds*, 1 Stra. 634, it was held, that not only the erection of a house so that the eaves overhang the land or house of another; but, also, the putting up of a spout so as to convey the water therefrom into the lands of an adjoining owner is an actionable nuisance. *Espinasse's Nisi Prius*, vol. 2, p. 270; *Stephen's Nisi Prius*, vol. 3, p. 236; *Fry v. Prentice*, 14 L. T. (N. S.) 298; *Baten's Case*, 9 Coke, 53; *Pickering v. Rudd*, 2 Eng. Com. Law, 56; *Kenyon v. Hart*, 6 B. & S. 249; *Aiken v. Benedict*, 39 Barb. (N. Y. Sup. Ct.) 400; *Reynolds v. Clark*, 2 Ld. Raymond, 1399; *Sherry v. Frecking*, 4 Duer (N. Y. Sup. Ct.), 452; *Pendruddock's Case*, 9 Coke, 101; *Bellows v. Sackett*, 15 Barb. (N. Y. Sup. Ct.) 96; *Bowry v. Pope*, 1 Leon, 168; *Codman v. Evans*, 7 Allen (Mass.), 431.

reason of which the plaintiff had been greatly annoyed and incommoded in the use and possession of his premises. It was held by the court that the *projection in itself was a nuisance* from which the law inferred a damage, and that the plaintiff could maintain his action in respect to the projection alone, even though no rain had fallen, and that the plaintiff was not confined to damage from the rain." Comyn in his Digest, vol. 1, p. 427, says: "An action upon the case lies for a nuisance to the habitation or estate of another; as if a man build a house hanging over the house of another, whereby the rain falls upon it, or fixes a spout upon his own house, whence the rain falls into the yard of another and injures the foundation of his buildings."

SEC. 102. In *Aiken v. Benedict*, 39 Barb. (N. Y. Sup. Ct.) 400, which was an action for damages by reason of the erection of a house by the defendant upon the line of his land, in such a manner that the eaves and gutters projected over the land of the plaintiff, it was held that an action for a nuisance would lie, but that ejectment was not a proper remedy.

SEC. 103. In *Pendruddock's Case*, 5 Coke, 101, the defendant, Pendruddock, bought a house erected by another person so that the eaves projected over the house of one Henry Clark, who also bought his house when the eaves of the defendant's house projected over the eaves thereof so that the rain fell from the roof of the defendant's house upon that of the plaintiff. The plaintiff brought a "*quod permittat*" to prostrate the nuisance, and among other questions that were passed upon by the court, was whether the plaintiff might abate the nuisance before any actual injury was done, and POPHAM, C. J., held that he might; "for," said he, "it is reasonable that he should prevent the prejudice and not stay until it be done." So far as the judgment of this case is concerned it was right, but it must be understood, however, as only applicable to that class of cases where the thing is in itself a nuisance, and though no damage has actually resulted, yet, in the very nature of things, it is sure to do so. It would not be applicable to an erection that may or may not become a nuisance. Thus, in *Norrice v. Baker*, 1 Rolle, 393, the court held that although the defendant was erecting a building

which might become a nuisance when completed, yet this would not justify the defendant in tearing away the scaffolds, etc., used in making the building. "And," said COKE, J., in this case, "So if a person have an intent to build a wall, and lays the foundation, you cannot pull this down;" and in the same case in illustrating the general doctrine that generally a nuisance cannot be removed by the act of the party or by suit until it actually becomes a nuisance, he said: "So, although boughs which hang over another's land may be cut, yet, they cannot be cut lest they should *hereafter* grow over."

SEC. 104. This is the rule in reference to all classes of nuisances, except such as are dangerous to life, or will be productive of irreparable injury to property. It cannot be abated, nor does it become actionable, until it actually exists. The fact that it is being erected, and will become so when completed, does not furnish sufficient ground for an action at law, consequently will not justify an abatement on the mere motion of the party, for no person under any circumstances can abate a nuisance, unless he can also maintain an action therefor. Equity will relieve a party against a prospective nuisance, where the danger therefrom is imminent, and where there is no question but the thing will be a nuisance, and the remedy at law is inadequate; but a court of law will wait until the nuisance is actually created.¹

SEC. 105. This species of injury is in the nature of trespass, but an action of trespass cannot be maintained any more than ejectment; for although, as has been previously stated, the owner of the soil has dominion over the space above it, and any interference therewith is unlawful, yet this space cannot in any sense be regarded as land; it is *immaterial*, and an entry into this void space, while it interferes with the right of the owner of the soil, can in no sense be said to be an invasion of the soil *vi et armis*. It is purely an injury that is the consequence of an

¹ *Norrice v. Baker*, 1 Rolle, 393; *Richards v. Phenix Iron Co.*, 7 Am. Law Reg. (N. S.) 346 (Penn.); *Ross v. Butter*, 19 N. J. 294; *Rhodes v. Dunbar*, 7 Am. Law Reg. (N. S.) 412; 58 Penn. St. 227; In *Wells v. Ody*, 1 T. & G. 715, it was held that where an action is partly a trespass and partly case, either action may be maintained.

act done outside the soil itself, for which case alone is the proper legal remedy. This distinction is important to be observed, for the reason that courts have sometimes fallen into errors upon this point that are not consistent with principle, and are subversive of the distinction between forms of action. In *Reynolds v. Clark*, 2 Ld. Rayd. 1399, an action of trespass was brought against the defendant for erecting a spout upon his own house that discharged the water accumulating upon his roof into the plaintiff's yard. The defendant justified upon the ground that the spout was necessary to carry away the water, and that it was erected in such a manner as to do the least possible injury. It was objected upon the trial that the action was *misconceived*. That if the injury was actionable at all, the action should be case, and *not* trespass. The court were unanimously of the opinion that the erection of the spout and the discharge of the water upon the plaintiff's land was an actionable nuisance, but that trespass could not be maintained. The injury, in order to maintain trespass, must be the direct and immediate result of a forcible act, while for every injury that is the consequence of an act, that is, indirect, case alone can be maintained, and that, as in this case the injury complained of was not the erection of the spout upon the plaintiff's land, but for an injury resulting to the plaintiff's land from the discharge of the water from the spout, the injury was purely consequential. In the case of *Sherry v. Frecking*, 4 Duer (N. Y. S. C.), 452, the defendant erected a building upon Eighth street in the city of New York, upon a lot adjoining a lot owned by the plaintiff, and in so doing encroached upon the soil of the plaintiff's lot some four or five inches, and also overhung the same with his wall at the top of said building some ten or twelve inches. The plaintiff brought his action under the Code for the recovery of the premises, and the damages for its detention, being a remedy in the nature of the common-law action of ejectment, and in his action sought to recover not only the soil actually encroached upon, but also the space which was overhung by the defendant's wall. Upon the trial of the action at circuit, a verdict was rendered for the plaintiff for the damages for withholding of the strip of land, and the injury to the plaintiff's premises by the overhanging of

the wall, and also for a recovery of the premises as claimed in the complaint. In the *superior court*, upon exceptions, the judgment was affirmed conditionally, Slosson, J., observing: "The claim is novel, but we do not see why, if A builds over, though not upon B's land, B may not have his remedy by ejectment. The action is for the recovery of real property, a term which is synonymous with 'lands, tenements and hereditaments.' Land, it hardly need be said, extends upward as well as downward, as far as the owner of the subjacent soil may see fit to extend it." 3 Kent, 387. The error of the court is palpable, and doubtless resulted from a hasty consideration of the case, and without the examination of any authorities, as none are cited or referred to in the opinion. This case was directly and positively overruled in *Aiken v. Benedict*, 39 Barb. (N. Y. Sup. Ct.) 400, which came before the supreme court at general term in 1863. This was an action of ejectment, brought to recover for the space overhung by the defendant's eaves and gutters over the plaintiff's premises. The action was brought upon the authority of *Sherry v. Frecking*,¹ which was cited and relied upon by the plaintiff on the trial. At the circuit the judge instructed the jury that an action of ejectment would not lie for an injury of this character, and a verdict was rendered for the defendant. At general term the judgment of the lower court was affirmed. WELLES, J., delivered a very able opinion in the case, in which he said: "The cases in which this action may be brought are not extended by the Code. If the action can be maintained, it must be upon the law as it stood before the adoption of the Revised Statutes. By the common law, ejectment will not lie for any thing whenever entry cannot be made, or of which the sheriff cannot give possession." It cannot be sustained for the recovery of property which in legal contemplation is not tangible.² The injury or wrong for which the action can be maintained must in fact or in law amount to an *ouster* or dispossession of the plaintiff.³ The general rule is that ejectment will lie for any thing attached to the soil, of which the sheriff can deliver possession.⁴ The plaintiffs claim that the word "land,"

¹ *Sherry v. Frecking*, 4 Duer (N. Y. S. C.), 452.

² 2 Crabbe on Real Prop. 710.

³ 4 Bouvier's Institute, § 3653.

⁴ *Id.*, § 3655.

⁵ *Jackson v. May*, 16 Johns. (N. Y.) 184.

in its legal signification, embraces not only every thing upon the face of the earth, but also every thing above and below it; and they invoke the maxim, '*cujus est solum, cujus est usque ad coelum*;' and therefore that no man may erect a building or the like to overhang another's land. That the defendant having erected his house so that the eaves overhung their land, he has unlawfully taken possession of so much of their land as the eaves occupy directly over the soil or the surface of their land. This was undoubtedly a violation of the rights of the plaintiffs, but we think ejectment, or an action to recover the possession of real estate, was not the appropriate remedy. Of what has the defendant taken possession that belongs to the plaintiff? Clearly nothing but an open space of air over the material land of the plaintiff. How could the sheriff put the plaintiff in possession of that space? It is not perceived how that could be done. If it could be done in one case, it could in every case, without reference to the locality of the space, provided it be superincumbent to the plaintiff's soil. The books furnish but a single case, so far as I have been able to discover, where ejectment was sustained under like circumstances; and yet, if the action would lie, it is remarkable that no other case to that effect has been reported either in this country or England. The books, from the earliest reports in the English language, wherever the common law has prevailed, down to near the present time, are full of actions of trespass on the case for nuisances, under circumstances similar in principle to the present. The action for a nuisance is an effectual remedy for just such a case; for if the defendant should be convicted, the judgment would be for damages and an abatement of the nuisance. The case above referred to where ejectment was maintained (*Sherry v. Frecking*, 4 Duer, 452), where the wall of the defendant's house overhung the plaintiff's lot, the point appears by the report of the case to have been decided with little or no consideration, and without referring to a single authority to show that ejectment would lie.

SEC. 106. As has been previously stated, where the erection actually projects over the lands of another, an action lies without any special damage. It is an injury to a right, and, in the

language of Lord Holt in *Ashby v. White*, *Ld. Rayd.* 988, "every injury to a right imports a damage of itself." The land owner has the right to control the space covered by the eaves of his neighbor's building, and, if he was compelled to wait until actual pecuniary damages had resulted to him from the erection, his neighbor might, by lapse of time and adverse enjoyment, acquire the right to have his eaves project there, and thus to that extent impose a servitude upon the adjoining estate.¹

SEC. 107. Not only is it unlawful and an actionable nuisance to erect a house or other building so that the eaves thereof actually project over the adjoining land, but it is also equally a nuisance to make an erection thereof so near to another's land that the rain or snow falling upon the eaves is discharged upon the adjoining land; and in this instance also an action may be maintained, but only for the special damage. In the first instance, the party injured may at his election cut off all that portion of the eaves that project over his land, and thus of his own motion abate the nuisance; or he may bring his action for the damages and also for an abatement of the nuisance; but in the last instance named he would not be justified in abating the nuisance until he had suffered special injury therefrom; for if no rain falls, no injury is done, and no right is acquired on the one hand, or injury sustained on the other, by the maintenance of the erection. But if rain is actually discharged upon the adjoining land from the building, or if it is conducted from the building by eavetroughs and a spout, and then discharged upon the adjoining land, or the land of the owner of the building, and from thence runs upon the adjoining land in greater quantity and volume than it otherwise would, an action lies for the injury and also for an abatement of the nuisance. But it would not be safe for a person injured in this manner to interfere with the building, because the nuisance consists purely in the discharge of the water, either in its natural state or congealed into ice and snow, upon his land, and the evil might be remedied by the wrong-doer by the employment of proper appliances, without the actual

¹ *Wright v. Williams*, 1 M. & W. 77; *Ashley v. Ashley*, 6 Cush. (Mass.) 70; *Carlyon v. Lovering*, 1 H. & N. 784; 70.

removal or destruction of the building. But in such cases the most prudent, and indeed the only safe course to pursue, is to bring an action for the damages and an abatement of the nuisance by the courts.¹

SEC. 108. Although a person may do any act upon his own land, and make any erections there which do not violate the rights of his neighbor, and to this extent has full dominion over his premises, and their uses, yet he has no right to make any erection there, the consequence of which is an invasion of a legal right of his neighbor, and if he does make such a use of his property, he does it at his peril, and no degree of care or skill on his part exercised to prevent injury, will be of any avail to him as a defense, if injury actually results from the act.² The act being of a character that may create a nuisance, he is liable for all the injurious consequences that flow therefrom; but no action can be maintained except in cases where there is imminent danger to the lives, or if irreparable injury to the property of others, until actual damage has resulted therefrom. Therefore, while a person may erect a building upon the line of his land, yet he is bound at his peril to do it in such a manner that the water, or snow and ice from its roof shall not fall upon his neighbor's land, or even upon his own, in such a manner as to escape upon his neighbor's land in larger quantities or greater volume than would go there if no erection had been made.³

SEC. 109. As illustrative of the doctrine of the preceding section, and of the liabilities of adjoining land owners for injuries resulting from water, in consequence of some unwarrantable act of one of them, the case of *Thomas v. Kenyon*, 1 Daly (N. Y. C. P.), 132, is directly in point. The action was brought to

¹ *Shipley v. The Fifty Associates*, 106 Mass. 104; 8 Am. Rep. 318; *Shipley v. The Fifty Associates*, 101 Mass. 251; 3 Am. Rep. 346; *Rylands v. Fletcher*, 3 H. L. C. 330; *Bellows v. Sackett*, 15 Barb. (N. Y. S. C.) 96; *Martin v. Simpson*, 6 Allen (Mass.), 102; *Ball v. Nye*, 99 Mass. 582; *Washburne on Easements*, 290.

² *Tremain v. Cohoes Co.*, 1 N. Y. 163; *Fletcher v. Rylands*, 1 L. R.

Exchq. 263; *Gordon v. Vestry of St. James*, 13 L. T. (N. S.) 511; *Phinze v. Augusta*, 47 Ga. 263; *Wilson v. New Bedford*, 108 Mass. 261; 11 Am. Rep. 252; *Cahill v. Eastman*, 18 Minn. 324; 10 Am. Rep. 184.

³ *Bellows v. Sackett*, 15 Barb. (N. Y. S. C.) 96; *Smith v. Fletcher*, *Exchq.*, June, 1872; *Shipley v. Fifty Associates*, 106 Mass. 104.

recover for injuries done to the plaintiff's premises by water which flowed upon his lot from the defendant's premises, where the defendant's ground was higher than the plaintiff's, and its natural slope was such that the water arising from natural causes beyond, and following the natural declivity of the ground, flowed into and collected in a hollow on the defendant's lot, directly adjoining the plaintiff's house. It appeared that at the time when the plaintiff purchased his lot there was a drain and culvert which carried the water off from the defendant's lot, but that before the commencement of the action, and before the cause thereof originated, this drain and culvert had been cut off and closed up by the owners of the lots through which it flowed, and that, in consequence of this, the water was thrown back upon the defendant's lot, and from thence flowed directly upon the plaintiff's lot. It appeared that both the plaintiff and defendant had built sheds or buildings which threw the water on the roofs into the defendant's lot, and that the water thus collected on the defendant's lot from all these causes, flowed into the plaintiff's lot, and frequently submerged the basement of his house, and also washed away a part of its foundation. It was held by the court upon this state of facts that, although the defendant was not liable for the effect produced by water flowing over his ground toward the plaintiff's lot in consequence of the natural formation of the soil, yet, it appearing that the body of the water on the defendant's lot was greatly augmented by the cutting off of the drain and the culvert, and the filling in of the adjacent sunken lots by their owners, the obligation was imposed upon the defendant in respect to his lot, to adopt means to prevent the water from collecting and remaining upon his premises, and that, although the pitch of the plaintiff's roof increased the body of the water, yet this would not prevent him from maintaining an action and recovering for the injury sustained by means of the defendant's erections.¹

SEC. 110. It may be understood that any erection upon one man's land, that projects over the land of another, as well as any

¹ *Thurston v. St. Josephs*, 51 Mo. Case, 5 Coke, 101; *Kenyon v. Hart*, 6 510; *Reynolds v. Clark*, 1 Stra. 634; B. & S. 249; *Aikin v. Benedict*, 39 *Pickering v. Rudd*, 2 E. C. L. 56; *Bow- Barb. (N. Y. S. C.) 400; Fry v. Pren-* *ry v. Pope*, 1 Leon, 168; *Pendruddock's* *tice*, 14 L. T. (N. S.) 498.

tree whose branches thus project, or any thing that interferes with the rights of an adjoining owner, is an actionable nuisance. Thus a bow-window that projects, a cornice, stoop, portico, or any thing that may be regarded as an invasion in any degree interfering with the rights of the owner of the soil may be regarded as a nuisance and actionable, to the same extent as though it was an actual invasion of the soil.¹

SEC. 111. In the case of *The Earl of Lonsdale v. Nelson*, 2 B. & C. 311, Mr. Justice BEST said: "Nuisances by an act of commission are committed in defiance of those whom such nuisances injure, and the injured party may abate them without notice to the party who committed them, but nuisances from omission may not be thus abated, except it be to cut the branches of trees which overhang the public road, or the private property of the person who cuts them. The permitting the branches of these trees to extend so far beyond the soil of the owner of the trees is an unequivocal act of negligence. The security of lives and property may sometimes require so speedy a remedy as not to allow time to call on the person on whose property the mischief has arisen to remedy it; in such cases a person would be justified in abating a nuisance from omission without notice. In all other cases of such nuisances persons should not take the law into their own hands, but follow the advice of Lord HALE and appeal to a court of justice."

SEC. 112. Trees whose branches extend over the land of another are not nuisances, except to the extent to which the branches overhang the adjoining land. To that extent they *are* nuisances, and the person over whose land they extend, may cut them off, or have his action for damages, and an abatement of the nuisance against the owner or occupant of the land on which they grow, but he may not cut down the tree, neither can he cut the branches thereof beyond the extent to which they overhang his soil.²

¹ *Com. v. Blaisdell*, 107 Mass. 234; *Com. v. McDonald*, 16 S. & R. (Penn.) 390; *Jenks v. Williams*, 115 Mass. 217; *Grove v. City of Fort Wayne*, 45 Ind. 429.

² While a man may not overhang

another's land even with the branches of a tree, and such a permissive act is a nuisance, yet, if the branches of a fruit tree which grows on the land of A overhang the land of B, B has no property in the fruit, neither can A

SEC. 113. While a man has a right to follow his own tastes and inclinations as to the style and character of the building that he will erect upon his own land, yet he has no right to erect and maintain there, a building that is dangerous, by reason of the materials used in, or the manner of its construction, or that is in a ruinous condition and liable to fall and do injury to an adjoining owner or the public. Such a building on a public street is a public nuisance, and is a private nuisance to those owning property adjoining it; and if the building falls and inflicts injury upon the adjoining owners or their property, or to any one who is lawfully in its vicinity, the owner is liable for all the consequences that ensue therefrom.¹

SEC. 114. Although buildings are necessary for the habitations of men, and essential for all the various uses of business, yet the owners of them are called upon to exercise the highest degree of care to prevent their becoming a nuisance to others. It is the duty of the owner or occupant of a building to keep the gutters and other appliances for the discharge of the water from the roof of his buildings in proper repair and condition to carry off the water that collects there, and he is bound to have them of sufficient capacity to discharge the water that may fall, even in an extraordinary storm, and he is bound at his peril to keep his gutters and escape pipes in proper repair; and if, from any cause, or cause that could have been prevented by the exercise of human foresight, the gutters and pipes fail to carry off the water from his roof, whereby the building of an adjoining owner or occupant is flooded and his property is damaged, he is liable for all the consequences that result from such defects.²

SEC. 115. Every person who, for his own profit or advantage, brings upon his premises, and collects and keeps there any thing

enter upon B's land to pluck it; but A owns the fruit and is entitled to it, if he can get it without trespassing upon B. *Hoffman v. Armstrong*, 11 Am. R. 537. The tree is wholly the property of him upon whose land it grows. *Masters v. Pollie*, 2 Rol. 141; *Holden*

v. Coates, 22 E. C. L. 264; *Waterman v. Tooper*, 1 Ld. Rayd. 737.

¹ *Benson v. Suarez*, 28 How. Pr. (N. Y.) 571; *Ferguson v. Salina*, 43 Ala. 398.

² *Gilbert v. Beach*, 4 Duer (N. Y. Sup. Ct.), 428; *Bellogs v. Sackett*, 15 Barb. (N. Y. S. C.) 96.

which, if it escapes, will do damage to another, is liable for all the consequences of his acts, and is bound at his peril to confine it and keep it in upon his own premises.¹ If he does not, he is answerable for all the damages that result therefrom, without any reference to the degree of care or skill exercised by him in reference thereto.² Therefore, if a man brings water upon his premises by artificial means, and collects and keeps it there, either in reservoirs or in pipes, he is bound at his peril to see that the water does not escape, to the damage of an adjoining owner.³ But if the water is thus brought upon his premises by artificial processes, in accordance with the provisions of a special or general act of the legislature, and the provisions of the act have been fully complied with, the party is only bound to the exercise of such reasonable care, to prevent the escape of the water by the bursting of the pipes or otherwise, as a reasonable man would exercise under such circumstances; and, if by causes that could not have been foreseen, the pipes burst and the water escapes, to the injury of another, he is not liable, except negligence on his part is proved.⁴

SEC. 116. If a person diverts water upon his premises by means of an artificial water-course, or an aqueduct, and collects it there for the purpose of a fish pond, or other use, unless it has been brought there under the provisions of a special or general law which has been fully complied with, he is liable for any

¹ *Ryland v. Fletcher*, 1 Exchq. Law R. 263; 3 H. L. 330.

² *Cahill v. Eastman*, 18 Minn. 324; 10 Am. R. 184.

³ *Ball v. Nye*, 98 Mass. 582; *Harrison v. Great Northern Railway*, 3 Hurlst & C. 231.

⁴ In *Blyth v. Birmingham Water Works Co.*, 11 Exch. 781, the defendants, under the provision of an act of parliament, laid down their water pipes in the city of Birmingham, and provided the same with good and sufficient fire plugs, as required to by said act, and in all respects complied with the requirements of the act authorizing the laying down of their pipes, and were guilty of no negligence in the laying down or in the maintenance of the same. During a

winter of extraordinary severity, when the severest frosts ever known in that locality set in and continued until after the accident for which this suit was brought, a large quantity of water escaped from the neck of the main, and forcing itself through the ground, flooded the plaintiff's cellar. The pipes had been laid twenty-five years, and had worked well during all that time. It was held by the court that the defendants having complied with the law, could not be held chargeable, except upon proof of negligence, and that the fact that water had been for some time observed upon the surface of the ground near the place where the accident occurred, afforded no evidence of the fact.

damage that results therefrom, either from an overflow of the water or other cause, and his liability will not depend upon the question of the degree of care which he has exercised, but he will be held chargeable for a nuisance.¹

SEC. 117. Every person has a right to lay drains or dig trenches upon his own land, carry away the water from his house or premises, and so long as ordinary care and prudence is observed in closing them and keeping them in proper condition to discharge the water without damage to others, they are not nuisances, and no liability exists for damages that accidentally result to others therefrom. But if they are not of sufficient capacity to discharge the water for the discharge of which they are designed, or if they are not kept properly cleansed and in proper repair, the owner or occupant of the premises is liable as for a nuisance for all the damages that result therefrom.²

SEC. 118. The rule is, that every person who constructs a drain or cesspool upon his own premises, and uses it for his own purposes, is bound to keep the filth collected there from becoming a nuisance to his neighbors.³ And in the case of *Alston v. Grant*,

¹ *Fletcher v. Ryland*, 1 Exch. 265; *Wilson v. City of New Bedford*, 108 Mass. 261; *Smith v. Fletcher*, Exch., June, 1872; *Pixley v. Clark*, 35 N.Y. 250.

² *Rockwood v. Wilson*, 1 Cushing (Mass.), 221. In *Harrison v. Great Northern Railway Co.*, 3 Hurlst & C. 231, the defendants dug a drain to carry away the water from their premises, and provided banks thereto of sufficient strength to withstand the pressure of the waters which ordinarily passed through and for the discharge of which it was designed, but not of sufficient strength to hold and discharge the waters that were often there through the wrongful acts of others; and upon one occasion the banks gave way and injured the plaintiff's premises, to recover for the damages of which this action was brought. The court held that the defendant was liable. See also *Bagnall v. London & North Western Railroad Co.*, 1 Hurlst. & C. 544, where a similar question was involved; *Russell v. Shenton*, 6 Jurist, 1059; *Tenant v. Golding*, 1 Salk. 21; *Lord Egremont v. Pulman*,

M. & M. 404; *Hoare v. Dickerman*, 2 Ld. Rayd. 1568.

³ *Marshall v. Cohen*, 44 Ga. 324; *Wormersley v. Church*, 17 L. T. (N. S.) 190; *Cook v. Montagu*, 26 id. 471; *Mackey v. Greenhill*, 30 Jur. 746; *Draper v. Sheering*, 4 L. T. (N. S.) 365; *Gordon v. Vestry of St. James*, 13 id. 511; *Guardians of Herndon Union v. Bowles*, 20 id. 609. Where, however, a building is rented and there are several tenants occupying different floors, and there is a water-closet on the second floor, the landlord is not liable for injuries sustained by the lower tenant by reason of the water-closet becoming a nuisance by the wrongful acts of the tenants. The landlord is never liable for nuisances created by his tenants. His liability extends only to such acts of the tenants as are in continuance of a nuisance existing at the time when the premises were let, or such as were created by the tenant by the express permission of the landlord. *McEwan v. Mills*, 2 W. W. & A. B. L. 118 (Victoria). In this case an upper tenant in cleaning out a cesspool upon his

3 Ell. & Bl. 128, it was held that if, by reason of the faulty construction of a sewer, the filth therefrom percolates through the soil and fills the cellars of the adjoining premises, or does other damage to them, the owner of the land is liable for all the damages, and that, too, even though he is the owner of the premises into which the filth flows, and the persons injured are his own tenants. But if a landlord builds a sewer or drain upon his own premises, and at the same time makes drains leading thereto from the houses in the possession of his tenants, he does not thereby become responsible for injuries resulting from their overflow or want of repair, unless he has specially covenanted to keep them in repair. *Prima facie* the duty is upon the occupant to keep the drains in repair. The draining of premises through the premises of another is an easement, and the right must be exercised in such a way as to produce no unnecessary injury or annoyance or nuisance to the servient tenement. The rule with reference to a drain or other water-course is the same as in reference to that of a right of way. The person exercising the right must keep it in repair, and must see to it that he does not so exercise his right as to create a nuisance; for his right is to a reasonable use for the purpose, and if it becomes unreasonable he is liable for the damages that ensue.¹

SEC. 119. Any artificial device by which water or other substances are collected or held, where, except for such device, they would not be collected or held, and which *may* escape, either by overflow, percolation, or in the form of noxious gases, upon the premises of another, is a nuisance; and the party creating it, or

floor which escaped through the floor, and damaged the plaintiff's goods. Held, that the landlord was not liable. See, also, *Pobbins v. Mount*, 4 Robertson (N. Y. S. C.), 553; *Guardians of Hendon v. Bowles*, 17 L. J. (N. S.) 597.

¹ *Brown v. Sargent*, 1 Fost & F. 112; *Child v. Boston*, 4 Allen, 141; *Barton v. Syracuse*, 37 Barb. (N. Y. S. C.) 392; *McSwiney v. Hayes*, 4 Ir. Eq. R. 322. In *Lord Egremont v. Pulman, M. & M.* 404, it was held that the grant of a water course through the land of another, imposes upon the grantee the duty of keeping the water course in proper repair, and that if it

is allowed to go to decay or get out of repair, whereby the lands of the grantor are flooded, the grantee will be responsible for a nuisance. In *Young v. Davis*, 31 L. J. Exch. 254, it was held that, even though a person bound to keep a highway in repair *ratione tenuræ* might not be liable to a stranger for damages resulting from non-repair, yet he would be liable to a lord of the manor, who relied on a prescription that he and all who had his estate had a right to have a bridge kept in repair by the owner of a mill. *Bel lows v. Sackett*, 15 Barb. (N. Y. S. C.) 96.

upon whose premises it exists, is liable for all the damages that ensue from such escape.¹ Thus, while no one is bound to drain his premises of the water collected there naturally, however injurious to others the neglect to do so may be, yet, if he has made excavations upon his own premises, in which the water collects, either by percolation from the soil or falling rains, and becomes stagnant and emits noisome and unwholesome gases, to the annoyance of others, he is not only bound to abate the nuisance, but is also liable to respond in damages to those injuriously affected thereby.² But where water collects in low marshy places, and, by reason of becoming stagnant, emits gases that are destructive to the health, and lives even, of the community, this is not a nuisance in the legal sense; and the owner of the land is not bound to drain it, nor can he be subjected to action or indictment therefor.³ The reason is, that in order to create a *legal* nuisance, the *act of man* must have contributed to its existence. Ill results, however extensive or serious, that flow from natural causes, cannot become a nuisance, even though the person upon whose premises the cause exists could remove it with little trouble and expense.⁴ Thus, if a sand bar is created in the bed of a stream, from deposits naturally collecting there, which chokes up the channel and sets the water back upon the land of others, and thus fills the atmosphere with deleterious gases, or injures the premises of another, the owner of the land upon which the cause exists is not bound to remove the bar, neither is he chargeable for a nuisance. Thus it will be seen that a nuisance cannot arise from the neglect of one to remove that which exists or arises from purely natural causes. But, when the cause is traceable to artificial causes, or where the hand of man has, in any essential measure, contributed thereto, the rule

¹ Ryland v. Fletcher, 1 L. R. (Exch.) 263; Cahill v. Eastman, 18 Minn. 324; Gordon v. Vestry of St. James, 13 L. T. (N. S.) 511; Att'y-Genl. v. Visitors of Colney Hatch Lunatic Asylum, 19 id. 290.

² Baird v. Williamson, 33 L. J. C. P. 101; Mackey v. Greenhill, 30 Jur. 746; Gardner v. Fraser, 22 D. 1501; Todd v. Burnett, 26 Jur. 374.

³ Hartwell v. Armstrong, 19 Barb. (N. Y. Sup. Ct.) 166; Woodruff v. Fisher, 17 id. 224.

⁴ Mohr v. Gault, 10 Wis. 313. But if a person has made any changes in the natural condition of the soil, or of a stream, or if he has been invested with certain powers by the legislature, he is bound to prevent the creation of a nuisance either from natural or artificial causes about his premises. Margate Pier Co. v. Local Board of Health, 20 L. T. (N. S.) 564; Bird v. Elwees, 18 id. 727; McAuley v. Roberts, 13 Grant's Ch. Ca. (U. C.) 565.

is entirely different.¹ A broad distinction exists between natural and artificial causes of injury. There are some cases in which the courts seem to have lost sight of this distinction,² but it may be regarded as the universally recognized doctrine of the courts, that liability exists for all damages resulting from unlawful acts, but that liability never exists where the damages are purely the result of natural causes, unaided by the act of man.

SEC. 120. If a person erects a dam upon a stream, and sets the water back, he is liable to a land owner above him on the stream, even though the water does not overflow the land, if thereby the water of the stream charges the land with water and spoils the grass or crops growing thereon, or even if no actual damage is done except to make that soil wet and spongy which otherwise would be dry.³ So, too, if by such setting back of the water, the water of a well or spring is injured; and that, too, whether the injury results from actual overflow, or from percolation.⁴ So if a person erects a vault or cess-pool upon his own premises, he is bound at his peril to keep in the filth; for if it escapes, either by percolating through the earth or otherwise, upon the premises of another, he is answerable for all the damages that ensue therefrom.⁵ So if a man erects a privy upon his premises, he is bound at his peril to prevent its infecting the atmosphere with noxious smells, to the annoyance of others.⁶ So if he brings water into his house, he must see to it that it does not, from any cause, escape to the injury of his neighbor's property.⁷ So, too, where water is penned back by a dam, or where it is brought, or

¹ *Wilson v. City of New Bedford*, 108 Mass. 261; 11 Am. R. 352; *Monson v. Fuller*, 15 Pick. (Mass.) 554; *Ball v. Nye*, 99 Mass. 582; *Pixley v. Clark*, 35 N. Y. 520; *Rylands v. Fletcher*, Law R., 1 Exch. 263; 3 H. L. 330; *Neal v. Henry, Meigs (Tenn.)*, 17; *Bigelow v. Newell*, 10 Pick. (Mass.) 348.

² *Chatfield v. Wilson*, 28 Vt. 49; *Harwood v. Benton*, 32 id. 724.

³ *Monson & Bromfield Manufacturing Co. v. Fuller*, 15 Pick. (Mass.) 554; *Pixley v. Clark*, 35 N. Y. 52.

⁴ *Fuller v. Chicopee Manufacturing Co.*, 16 Gray (Mass.), 46; *Neal v. Henry, Meigs (Tenn.)*, 10.

⁵ *Rex v. Pedley*, 1 Ad. & El. 822;

Ball v. Nye, 99 Mass. 582; *Tenant v. Golding*, 1 Salk. 360; 2 Ld. Raym. 1089; 6 Mod. 311.

⁶ *Draper v. Sheering*, 4 L. T. (N. S.) 365; *Marshall v. Cohen*, 44 Ga. 489; *Cook v. Montagu*, 26 L. T. (N. S.) 471.

⁷ *Fletcher v. Ryland*, Law R., 1 Exch. 263. In *Marshall v. Cohen*, 44 Ga. 489, 10 Am. R. 170, it was held that where the owner of a building rented the lower story to plaintiff, and the upper story to other tenants, he was liable for injuries sustained by the lower tenant from the overflow of a water-closet, which was occasioned by the negligence of the tenants of the upper floors.

from any artificial cause thrown upon the premises of another, or upon the party's own premises, and, becoming stagnant, emits noisome or unwholesome vapors, this is a nuisance for which the party creating it will be liable for all injuries that result therefrom, and it will be no defense that there are other structures that contribute to the injury, nor can there be any prescriptive right acquired to inflict such injuries.¹

SEC. 121. In *Woodruff v. Fisher*, 17 Barb. (N. Y. Sup. Ct.) 224, the question as to the liability of owners of swamp lands to drain them, where their neglect to do so operated injuriously to the health and comfort of the neighborhood, was discussed by the court, and HAND, J., in delivering the opinion of the court, said: "The owners of these lands could not be convicted of a public nuisance because they do not drain these swamps, even though they were the owners of the lands upon which the obstructions are situated. No liability exists, because, *in a state of nature*, it may be productive of sickness." The same doctrine was also established in *Hartwell v. Armstrong*, 19 Barb. (N. Y. Sup. Ct.) 166, in a case involving similar questions. In *Mohr v. Gault*, 10 Wis. 313, the defendant was the owner of certain lands, including the bed of a stream, which formed the outlet of a natural pond. Upon the occasion of a severe freshet, large quantities of earth and debris were deposited in the bed of the stream, at the outlet of the pond, preventing the escape of the water in its usual flow, and thus setting it back upon the lands above, and, by reason of the vapors arising from the stagnant water thus set back, was productive of much sickness and discomfort in the neighborhood. In an action against the owner of the lands upon which the obstruction existed, it was held by the court that no recovery could be had against him, unless the injury could be attributed to the act of man, rather than natural causes, and that, in order to make out a nuisance, it must be shown that it is the result of human agency in some form. No man can be made liable for injuries resulting from natural causes

¹ *Day v. State*, 4 Wis. 387; *Rooker v. Perkins*, 14 id. 79; *Laning v. State*, 1 Chand. (Wis.) 178; *Stoughton v. State*, 5 Wis. 291; *Com. v. Webb*, 6 Rand (Va.), 726; *Spencer v. Commonwealth*, 2 Leigh (Va.), 759; *Miller v. Truehart*, 4 id. 569.

purely; but if he has done some act which interferes with the natural condition of things, and through his interference therewith, produces injury to another, he is liable for all the consequences that can be traced to his wrongful act.¹ Thus one land owner cannot be made liable to another because of injuries resulting to his property from the escape of surface water upon his premises, owing to the natural formation of the land; but if he erects embankments upon his own land, or digs trenches, and thus sends the water upon his neighbor's land in a different manner, or at a different point from which it would naturally go there, he has created a nuisance, and is liable for all the consequences of his acts,² and this, too, even though no real damage is thus inflicted upon his neighbor. This principle is well illustrated in the case of *Bellows v. Sackett*, 15 Barb. (N. Y. Sup. Ct.) 96, which was an action brought to recover for injuries sustained by the plaintiff, by reason of the water falling from the eaves of his house, upon the defendant's own land, from which it escaped upon the plaintiff's premises, and damaged the walls and timbers of his dwelling-house. The defendant was the owner of a small story and half dwelling-house which was erected some twenty-five years before the bringing of the action. Some fourteen years before the cause of action arose, the plaintiff erected upon his lot adjoining, and within about eighteen inches of the defendant's house, a large three-story brick dwelling. The solid gable end of the plaintiff's building faced the east side of the defendant's building, the roof of which extended north and south. The plaintiff's water table was at this end on a level with the ground. The plaintiff's cellar was about two feet lower than the cellar of the defendant's building, and the ground between the buildings was the lowest at about half the length of the defendant's house. The water falling upon the defendant's roof fell between the two buildings, and collecting in the low place be-

¹ *Tuthill v. Scott*, 43 Vt. 525; *Beard v. Murphy*, 37 id. 104; *Miller v. Laubach*, 47 Penn. St. 155.

² *Tuttle v. Clifton*, 22 Ohio St. 247; 10 Am. Rep. 732; *Martin v. Riddle*, 26 Penn. St. 415; *Lammier v. Francis*, 23 Mo. 181; *Bentz v. Armstrong*, 8 Watts & S. (Penn.) 40; *Earle v. DeHart*, 1 Beasley (N. J.), 280; *Ennor v. Barwell*,

2 Giff. 410; *Kauffman v. Griesmier*, 26 Penn. St. 407; *Lattimore v. Davis*, 14 La. 161; *Curtis v. Erie R. R. Co.*, 14 Allen (Mass.), 55; *Laney v. Jasper*, 39 Ill. 54; *Adams v. Walker*, 34 Conn. 446; *Gilham v. R. R. Co.*, 40 Ill. 484; *Sweet v. Cutts*, 50 N. H. 439; *Goodale v. Tuttle*, 29 N. Y. 467; *Hayes v. Hinckley*, 68 Penn. St. 324.

tween the buildings, penetrated through the wall of the plaintiff's building into his cellar, which was the injury complained of. It appeared that a slight expenditure of money or labor on the part of the plaintiff would have obviated all the damage, and that the defendant was not in possession of his premises and had not been for over twelve years, and that the plaintiff never complained to him of the injury he was receiving from the water from his roof, or in any wise called his attention thereto. The plaintiff having obtained a verdict in the court below, the case came before the supreme court, and JOHNSON, J., laid down the rule applicable to this class of injuries, thus: "The defendant had a clear right to erect his house, to cover it with a roof, which would prevent the rain from falling upon the surface it covered, and to turn the water falling upon the roof upon any portion of his own land at any point, and in any quantity he might choose. But for such interruption or diversion to the manifest injury of another, he is clearly responsible. Here, owing to a want of suitable repairs, the water falling upon an area of twenty-five feet by thirteen, is collected at a single point and precipitated in an unnatural and unusual quantity and manner, so near the plaintiff's premises as necessarily to cause him an injury. It is said that the plaintiff might have prevented the injury by a suitable embankment between the buildings, and that by neglecting to make such an embankment, or to take any other precautions to prevent the water from flowing through his wall, he is to be regarded as contributing in some degree to the injury, and therefore cannot recover. But I do not see that the principle applies in a case like this. The aggressor can never say that it was the duty of the assailed to ward off a blow unlawfully aimed at him." In *Benson v. Suarez*, 28 How. Pr. (N. Y. Sup. Ct.) 511,¹ the defendant had erected a shed upon the extremity of his land adjoining the plaintiff's land, which had fallen into decay. The defendant had rented the premises and they were in the possession of a tenant at the time when the injury happened. The shed being in an unsafe condition through the neglect of the defendant and his tenants to repair, it was blown down upon the occasion of a high wind, and injured the plaintiff's buildings.

¹ *Benson v. Suarez*, 19 Abb. Pr. 61; *Payne v. Rogers*, 2 H. Blacks. 350.

PECKHAM, J., in delivering the opinion of the court, said: "The defendant was the owner of the tavern stand and appurtenances where the old shed fell. He had leased them, and covenanted to keep them in repair. He failed to keep the shed in repair, and as a consequence of its being left in a weak and dilapidated condition, it blew down and threw down a shed belonging to the plaintiff and injured his wagons. I am not at all clear that it was necessary to show any covenant to repair by the defendant, in order to sustain this action, '*Sic utere tuo alienum non laedas*,' is a sound maxim and entirely applicable to this case. An adjoining owner has no right to erect a nuisance on his own land to the injury of his neighbor. He *cannot erect so weak and unsafe a building that it shall fall in ordinary times from its mere insecurity and insufficient strength* and thus injure the buildings or property of his neighbor, without being liable for the injury. Nor can he shield himself from liability by charging negligence upon his neighbor for occupying his own premises in the face of such a danger."¹

SEC. 122. The cases cited fully illustrate the doctrine announced in the text, and embody the principles that are applicable in all cases of injury to property by one, in consequence of a wrongful use of the property of another. In *Bellows v. Sackett*, the erection of the house was lawful of itself, but the plaintiff was bound at all hazards to see to it, that the water falling upon his roof and descending upon his land in quantities, and in a manner different from that in which it would naturally descend, should not injure his neighbor's property, and that while his house was not of itself a nuisance, yet it became so whenever it so far changed the natural course and condition of the elements, as to trench upon the rights of another. A man may erect a house upon his land, and may construct it in such a manner, and with such a roof as he chooses, but he is bound at his peril to provide against injury to his neighbor. In *Benson v. Suarez* this principle is still further illustrated. In that case the doctrine is fully established, that a man may not do that upon his own premises,

¹ *Godley v. Haggerty*, 20 Penn. St. 387, as to liability of landlord to tenants for injuries from insecure house. But see *Robbins v. Jones*, 15 C. B (N. S.) 221.

which endangers the lives or property of adjoining owners. That if he builds a house upon his land, he is bound to build it of sufficient strength to not only support its own weight, but also to withstand the usual or even extraordinary action of the elements, and not only that, but is bound at all times to keep it in such a state of repair, as will prevent it from doing injury to his neighbor by reason of its inherent weakness or want of repair. These cases also illustrate other principles which are fully sustained by a multitude of authorities, and that is, that the question of liability for injuries from a nuisance from a use of property in itself are in no measure dependent upon the question as to which has first exercised his right, but that both have a right to use their property in all lawful ways, at such times, and by such methods as they choose, but the mere circumstance that one has first applied his property to a particular use does not prevent another applying his property to a like use, even though, by such later use, the use to which the first in point of time has applied his property becomes a nuisance; and still farther, that one cannot be deprived of a lawful use of his property, even though another, by an unlawful use of his, has made it dangerous for the other to use his property in the usual lawful modes, and that such lawful use, even in the presence of impending danger from the other, will not, in law, be regarded as contributory negligence.

SEC. 123. The doctrine applicable to this class of actions is well illustrated in numerous cases, and as it will be impossible to enumerate all the uses of property that may create a nuisance I cannot do better than refer to some of them. In a recent case in Massachusetts (*Wilson v. City of New Bedford*, 108 Mass. 261, 11 Am. Rep. 352), the plaintiff was the owner of a farm with a dwelling and barn thereon, and the defendant, in pursuance of a statute to provide its inhabitants with water by means of a reservoir and aqueduct, purchased of the plaintiff a portion of his land "for the purpose," as expressed in the agreement of sale "of constructing, using and maintaining an aqueduct and reservoir, and all other works necessary and convenient for introducing water into the city." The city, in pursuance of this agreement, built a dam on the premises and erected a very large artificial

pond or reservoir of water, within about a thousand feet of the plaintiff's farm. As a result of the creation of this reservoir, the soil of his farm became injuriously impregnated with water, and water also found its way into the cellar of his house; whether these results were attributable to the penetration of the water from the reservoir, or whether they ensued from the fact that the raising of the pond prevented the escape of the water, in the soil itself, as it had previously done into the natural stream, did not appear; but, that the damage resulted from one or the other of these causes, by reason of the erection of the reservoir, was a fact found in the case. The defendant insisted that it was not liable to respond in damages to the plaintiff. That the purchase by it of the plaintiff of the land for the purposes therein named, estopped the plaintiff from setting up a claim for damages resulting in anywise from such use. But the court held that the defendant was liable. That the erection of this artificial pond in the vicinity of his premises, if it injured his land either by impregnating the soil with water by percolation, or by cutting off the passage of the underground water in its ordinary and usual manner into the natural stream, was an injury to the right of the plaintiff notwithstanding the conditions of the conveyance. CHAPMAN, Ch. J., in delivering the judgment of the court, among other things said: "We think the petitioner's claim is not only sustained by authority, but is founded in justice. He ought to be compensated, and the law would be defective if it failed to give him a remedy. The agreement which was made by the petitioner to sell the respondent a tract of land on the stream, and the deed made by him in conformity with it, are not to be construed as a release of damages for any injuries which the respondent might sustain to his other land."¹

SEC. 124. So too in the case of *Fletcher v. Ryland*, Law Rep., 1 Exchq. 263, aff'd, 3 H. L. Cas. 330, this principle is aptly announced and illustrated. It appeared in that case that

¹ *Guardians of Hendron Union v. Mackey v. Greenhill*, 30 Jur. 746; 20 Bowles, 20 L. T. (N. S.) 609; 17 id. 597; *D. 1251*; *Gardner v. Fraser*, 22 D. 1501; *Gordon v. Vestry of St. James*, 18 id. *Todd v. Burnett*, 26 Jur. 374; *Jolliffe v. Wallasley Board of Health*, 29 L. T. 511; *Phinze v. Augusta*, 47 Ga. 263; *Hipkins v. Birmingham and Staffordshire Gas Co.*, 1 L. T. (N. S.) 308; 17 id. 190.

the plaintiff owned a colliery under the lands occupied by the defendants, and upon which was a mill operated by them called the Ainsworth Mill. For the convenience of this mill, and in pursuance of an arrangement made with Lord Wilton, the defendant made a reservoir upon his land separated from the mill by the lands of two other persons named Hutton and Whitehead. Whitehead's land lay to the north of and adjoining the land over the Red House Colliery; on the west it adjoined Hutton's lands, and on all the other sides, adjoined Lord Wilton's land. Hutton's land lay to the west of and adjoining Whitehead's land; on the north it adjoined the lands of Lord Wilton, in which the reservoir was constructed, and on the south it adjoined the Red House Colliery and the defendant's mill, the mill lying to the west of the colliery. The seams of coal to the Red House Colliery continued under the lands of Hutton and Whitehead, and under the lands of Lord Wilton in which the reservoir was made, their dip being downwards, from north-east to south-west. The coal under the side of the reservoir, and under Lord Wilton's land lying between that site and Hutton's land as well as under the lands of Hutton and Whitehead, had, at some time beyond the memory of man, been partially marked; and before the plaintiff began working the Red House Colliery, the old coal working under the site of the reservoir, communicated with old coal workings under Whitehead's land by means of the intervening old coal workings under the land of Hutton and under the land of Lord Wilton lying to the north of Hutton's land. The plaintiff, shortly after he commenced the working of the Red House Colliery, also made arrangements with Whitehead to work the ungotten coal lying under his land by means of the Red House pit. In pursuance of this arrangement, he, in 1851, worked through into the coal under Whitehead's land and thus opened up a communication between the two mines into the old workings there, and thus, by means of these workings, opened up a communication with the old workings under the reservoir, so that water escaping from the reservoir would find its way through these channels into the Red House Colliery. Lord Wilton was ignorant of the arrangement between the plaintiff and Whitehead, and of the plaintiff's work-

ings in the coal under Whitehead's land, but the fact afterward became known to his agent, and no objection was made by him to the plaintiff's working there. The defendants constructed the reservoir in question several years after the plaintiff had worked the coal in the two workings, and after the communication between the mines had thus been effected, but neither they nor their agents had any knowledge of this fact until after the reservoir had burst and the damage been done. In the construction of the reservoir the defendants employed a skillful and competent engineer, and also competent contractors, by whom the site for the reservoir was selected, and in pursuance of whose plans it was constructed. On the part of the defendants themselves it was found that there was no negligence whatever, but the engineer and contractors did not make suitable provision for the support of the pressure of the water in the reservoir, in view of the old shafts that were found located beneath it. The reservoir was completed early in December, 1860, and when it was partly filled with water, one of the old shafts gave way and burst downwards, and the water flowed down the shaft into the old working, and thence found its way into the Red House Colliery, where the damage was done. The case was heard in Exchequer upon a case stated, and the question submitted to it was, whether under this state of facts the plaintiff was entitled to recover any, and if so, *what* damages? The questions involved in the case were most ably argued, and BLACKBURN, J., in delivering the opinion of the court, entered into an exhaustive review of the principles involved in the case, holding that the plaintiff was clearly entitled to recover, and giving utterance to that principle which has since been so largely and approvingly quoted by the courts of this country, as follows: "We think that the true rule is, that he who, for his own purposes, brings on his lands, and collects and keeps there, any thing likely to do mischief, if it escapes, must keep it in at his peril, and if he does not do so, is *prima facie* liable for all damages which are the natural consequences of its escape. * * * The person whose grass or corn is eaten down by the escaping cattle of his neighbor,¹ or whose mine is

¹ *Tenant v. Goldwin*, 2 Lord Ray. J. C. P. 89; *May v. Bardett*, 33 B. mond, 1089; *Cox v. Burbridge*, 32 L. 112.

flooded by the escaping water from his neighbor's reservoir,¹ or whose cellar is invaded by the filth from his neighbor's privy,² whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor's alkali works,³ is damnified without any fault of his own, and it seems but reasonable and just, that the neighbor who has brought something out of his own property, which was not *naturally* there, harmless to others, so long as it is confined to his own property, but mischievous if it gets on to his neighbor's, should make good the damage which ensues if he does not succeed in confining it to his own property. But for his bringing it there, no mischief could have ensued, and it seems but just that he should at his peril keep it there, so that no mischief may ensue, or answer for the natural and anticipated consequences. And upon authority, we think this to be the law, whether the thing so brought be beasts or water, or filth or stench.

SEC. 125. But while this is the rule as between those owning and occupying separate buildings or premises, yet, as between the occupants of different floors of the same building, the rule is different, and each occupant is only bound to the exercise of reasonable care to prevent injury from an overflow or escape of the water. For injuries resulting from apparent defects, or from causes that would reasonably be anticipated, liability exists, but not when the ill results are purely accidental and not in any measure attributable to the negligence of the occupant. In *Ross v. Fedden*, L. R., 7 Q. B. 661, the plaintiff was tenant from year to year of the ground floor of No. 2 Queen street, Newcastle, where he carried on business as an iron monger. The defendants, from year to year, of the second floor of the same house, which they occupied as offices, some time between the evening of Saturday, the 26th of November, and the morning of Monday, the 28th of November, 1870, water escaped from a water-closet in the defendant's premises, found its way down through the

¹ Leigh's *Nisi Prius*, 555; *Tenant v. Goldwin*, 1 Salk. 21; *Smith v. Humbert*, 2 Kerr (N. B.), 602.

537; *Hart v. Taylor*, 4 Mur. (Scotch.) 313.

² *Walter v. Selfe*, 4 Eng. Law & Eq. 20; *Ballamy v. Comb*, 17 F. C. (Scotch) 159; *Norris v. Barnes*, L. R., 7 Q. B.

³ *Smith v. Fletcher*, Exchq. 1872 (June); *Bagnall v. London N. W. R. R. Co.*, 7 H. & N. 423; *Cahill v. Eastman*, 18 Minn. 324, 10 Am. Rep. 184.

first floor to the ground floor and there did damage to the plaintiff's premises and goods to the extent of £79 5s. 3d. This damage the plaintiff sought to recover from the defendants in this action. The plaintiffs claim to recover upon two grounds. First, that the mischief arose from the negligence of the defendants. Upon this matter the evidence was very slight, and there was no inconsistency in it. The closet was inside the defendant's private office, and no one had access to it but the two partners in the defendant's firm, and it was for their exclusive use. One of the partners was from home at the time of the occurrence; the other partner, who was called as a witness, stated that the closet had previously to the Saturday been in good order; that he believed he had used it on the Saturday morning and found nothing amiss, and no one could have used it afterward; that on the Saturday evening at about 6 or 6.30, he washed his hands at the wash-stand in the same room with the closet, and nothing then appeared to be the matter with it. He then left the office and no one entered it again until Monday morning. On the Monday morning when the plaintiff came to his shop, he found the damage done. Together with a plumber, whom he had sent for, he traced the escape of water upward to the second floor. They obtained access to the defendant's offices and the closet inside, and found that the water had overflowed the pan. On examination it appeared the cause of this was that the valve admitting the supply of water to the pan had given way and failed to close, and the over-flow pipe had become stuffed with paper; the valve, the defect in which was the real cause of the mischief, was under the seat of the closet, and could only be reached or seen by removing the wood work. Upon this evidence the court held that the defendants were not guilty of any negligence. Up to Saturday evening there was no reason to suspect that the valve had given way, or was in any danger of giving way, or that any thing was wrong with the closet, and there was no reason to anticipate any danger therefrom. But it was insisted, on behalf of the plaintiff, that he was entitled to recover, even in the absence of any negligence on the part of the defendants. The court say: "It is argued upon the authority of *Rylands v. Fletcher*, Law Rep., 3 H. L. 330, and other cases similar in prin-

ciple. In that case it was decided that, as between adjoining owners, one who diverted water from its natural flow, and accumulated it on his own land for his own purposes, is bound, at all hazards, to prevent its escape, and if it does escape, negligence or no negligence, he is responsible to his neighbor for the consequences. It is contended that the same rule applies to this case. On the other hand, the case of *Carstairs v. Taylor*, Law Rep., 6 Ex. 217, has been cited. In that case the plaintiff was the occupier of the ground floor of a warehouse, and the defendant of the upper part. The water from the roof was collected by gutters into a box. The water escaped and injured the plaintiff's goods in his warehouse below; and it was held that the defendant was not liable for this damage. That case is not, I think, at all a direct authority for the decision of the present; it differs in two important particulars. The apparatus for conducting the water was there as much for the benefit of the plaintiff as of the defendant, a fact upon which much stress is laid in the judgment of BRAMWELL, B., while here the water-closet was solely for the defendants' benefit; and further, in that case, the circumstance that caused the damage was one falling under the head of *vis major*, a fact to which much weight is given by the LORD CHIEF BARON and MARTIN, B. This cannot be said in the present case. I think, however, that the judgment in *Carstairs v. Taylor* leaves it very doubtful whether the rule of law, laid down in *Rylands v. Fletcher*, Law Rep., 3 H. L. 330, in the case of adjacent owners, applies to the case of two persons occupying two floors of the same house. But assuming the rule to apply, is the present case within it? As between the occupiers of part of a house — a thing wholly artificial — it is rather a straining of language to speak of any one state of things as more *natural* than another. But I think that in the words of MARTIN, B., in the case already referred to, "one who takes a floor of a house must be held to take the premises as they are." As far as he is concerned, I think the state of things then existing may be treated as the natural state of things, and the flow of water through cisterns and pipes then in operation as equivalent to the natural flow of water. I think he takes subject to the ordinary risks arising from the use of the rest of the house as it stands; and that one who

merely continues to use the rest of the house as it stands and in the ordinary manner does not fall within the rule laid down in *Rylands v. Fletcher*, and in the absence of negligence, is not liable for the consequences; and, in the present case, there is nothing to show, nor has it been suggested that it has been in any way altered since the plaintiff became tenant of the ground floor, or that it has been used in any but the ordinary manner. The question is one of some difficulty, but my opinion is that, under the circumstances of the case, in the absence of negligence on the part of the defendants, they are not liable for the damage which the plaintiff has sustained. BLACKBURN, J., said: "I think it is impossible to say that defendants, as occupiers of the upper story of a house, were liable to the plaintiff under the circumstances found in the case. The water-closet and the supply-pipe are for their convenience and use, but I cannot think there is any obligation on them at all hazards to keep the pipe from bursting or otherwise getting out of order. The cause of the overflow was the valve of the supply pipe getting out of order, and the escape pipe being choked with paper, and the judge has expressly found that there was no negligence, and the only ground taken by the plaintiff is, that the plaintiff and defendants, being occupiers under the same landlord, the defendants, being the occupiers of the upper story, contracted an obligation binding them in favor of the plaintiff, the occupier of the lower story, to keep the water in at their peril. I do not agree to that; I do not think the maxim "*Sic utere tuo ut alienum non laedas*," applies. Negligence is negatived, and probably if the defendants had got notice of the state of the valve and pipe and had done nothing, there might have been ground for the argument that they were liable for the consequences; but I do not think the law casts on the defendants any such obligation as the plaintiff contends for. The judgment must, therefore, be affirmed. MELLOR, J.—I am of the same opinion. I was prepared to listen to any authority in favor of the plaintiff, but none has been found. In the absence of negligence, there is nothing in the relative position of the parties which would make the defendants liable. The statement in the case rendered the judge's decision doubtful, but this was cleared up when the judgment was read. I was very glad that

this was done. I am quite satisfied with the reasoning in it. *Rylands v. Fletcher* does not apply; and *Carstairs v. Taylor* is a much stronger case than the present, as it seems to me in favor of the defendants.”

SEC. 126. The case of *Marshall v. Cohen*, 44 Ga. 489; 9 Am. Rep. 170, might be regarded as in conflict with the doctrine of this case, but an examination of the facts of the case shows that the defendant was clearly chargeable with negligence, and that this was the ground upon which the court upheld the action. It appeared that the plaintiff was the occupant of the ground floor of a building owned by the defendant; the upper portion of the building was occupied by other tenants; there was a water-closet on the upper floor for the convenience and use of the tenants of that floor; the water-closet and pipes were not in a defective condition, and, therefore, were not a nuisance when the plaintiff rented the store. But it did appear that the closet was used not only by the tenants, but was open night and day for the use of outsiders, and was at times in very bad condition, and the plumber who had been called by her on one or two occasions to repair the closet, advised her to close it up. It also appeared that previous to the damage sued for there had been a leakage and her attention was called to it, *and she promised to repair it*, but neglected so to do, and the result was that the water overflowed and injured the plaintiff's goods. LOCHRAM, C. J., says: “There is nothing clearer, as a principle of law, than that a party is liable for damages done by himself, his servants or agents in maintaining and keeping up a private nuisance. The evidence in this case shows that this closet was, at times, in very bad order and condition; *that it was kept in this condition.* * * * And it appears, previous to the damage sued for, there was a leakage of which she was notified, *and she promised to fix it.*” Thus it will be seen that in this case there was the most flagrant negligence on the part of the defendant in not keeping the water-closet closed, except as to her tenants, and in not repairing it when she was notified of its leaky condition, and *particularly* when she had *agreed* to do so. Nothing is better settled, than that defective water-closets, defective water-pipes, or the negli-

gent maintenance of any thing which may become a nuisance except by the exercise of proper care, becomes a nuisance when negligently or carelessly maintained. That the court in this case put the defendant's liability squarely upon the *negligence* of the defendant is apparent. "A general principle may be recognized," says the judge farther on in his opinion, "that one who *permits* a wrong to be done is as liable as he who does it. In *torts* all are regarded as principals. This damage was the result of a nuisance kept by the landlord upon the premises; and that it was done by his own tenants does not change the charge or remove the liability. One who erects any thing upon his land which, by ignition, burns down the house of one adjoining, is liable. * * * The act was produced by a water-closet which, if not kept clean and in proper order, was *per se* a private nuisance, and the natural and ordinary consequence of which was to produce a nuisance in the inherent consequence of the thing itself. And when there was proof, as in this case, of this defect *being known to the defendant* by information and by actual notice of a previous leak, we think the reasons of this liability appear."¹

SEC. 127. In *Carstairs v. Taylor*, previously referred to, the plaintiff and defendant were the occupants of the same building. The plaintiff of the lower story, and the defendant of the upper story. For their mutual use and benefit a tank was erected in the upper story, connected with the gutters and the roof, so that the rain falling upon the building was collected and gathered in the tank, and was used by both occupants. A rat having eaten a hole through the tank, the water escaped, and flooded the plaintiff's premises. The court held that, under the circumstances of this case, the rule in *Rylands v. Fletcher* did not apply, for the water was collected for the use of both parties, and

¹ *Robbins v. Mount*, 4 Rob. (N. Y. 16) 553; *Treadwell v. Davis*, 39 Ga. 240; *Bail v. Nye*, 99 Mass. 582; *Whitehouse v. Birmingham Canal Co.*, 5 H. & N. 928; *Blyth v. Birmingham Water Works Co.*, 11 Exchq. 781; *Bagnall v. R. R. Co.*, 1 H. & C. 544; *Harrison v. Great Northern R. R. Co.*, 3 id. 231;

Bell v. Twenty men, 1 Q. B. 766; *Bell v. Armstrong*, 10 Ind. 181; *Warren v. Kauffman*, 2 Phila. 259; *Killon v. Power*, 51 Penn. St. 429; *Moore v. Goedel*, 7 Bosw. (N. Y.) 591; 34 N. Y. 527; *Ortmayer v. Johnson*, 45 Ill. 469; *Weston v. Incorp. of Tailors, Hay*, 66.

the injury resulted, not from any negligence of the defendants, but rather was attributable to *vis major*.

SEC. 128. In *Robbins v. Mount*, 4 Robertson (N. Y.), 553, the building was occupied by numerous tenants, and the landlord provided a janitor to take charge of the building, who was paid for his services by the tenants according to the space that each occupied. A faucet was left open in a room of an upper tenant one night and the water left running into a urinal, which being choked up with tobacco overflowed and damaged the tenants below. Upon the trial in the court below the judge charged the jury, that if the overflow was caused by the *negligence* of the defendant; or if the fixture was *improperly constructed*, or should not have been there at all, or if all the safeguards that could *possibly* have been placed there, were *not* placed there, and the fixture was unsafe, the defendants were liable irrespective of the question of negligence. The jury having found for the defendant the ruling of the judge was fully sustained.

SEC. 129. There is a wide distinction between acts lawful in themselves, done by one upon his own premises, which *may* result in injury to another if not properly done or guarded, and those which in the nature of things *must* so result. In the former case a party could only be made liable for actual negligence in the performance of the act or mode of maintaining it,¹ while in the latter case he would be liable for all the consequences of his acts whether guilty of negligence or not.² The one act only becomes a nuisance by reason of the negligent manner in which it is performed or maintained, while the other is a nuisance *per se*.³

SEC. 130. In *Rockwood v. Wilson* the court say that "nothing can be better settled than that if one do a lawful act on his own premises, he cannot be held responsible for injuries that *may* result from it, unless it was so done as to constitute actionable negligence," and this is sometimes quoted as sustaining the doctrine that a person is never liable for the consequences of a lawful act, unless

¹ *Rockwood v. Wilson*, 11 Cushing (Mass.), 22.

² *Bagnall v. London N.W. R. R. Co.*, 7 H. N. 423.

³ *Cahill v. Eastman*, 18 Minn. 324, 10 Am. Rep. 184; *Phinney v. City of Augusta*, 47 Ga. 263; *Lawson v. Price*, 45 Md. 135.

chargeable with negligence. But this is clearly not the sense in which the court intended to be understood, for in the same judgment they refer to and distinguish between this class of acts, and those which amount to private nuisances, which it terms *unlawful* acts. Indeed, the court evidently had in view the distinction between acts that merely *may*, and those which absolutely *must* result injuriously to others, if they, from any cause, miscarry; and this view of the evident meaning of the court is strengthened by the authorities to which it refers to sustain its doctrine.¹ Generally, the question of care or want of care is not involved in an action for injuries resulting from a nuisance, and the presence or absence of the one or the other will not operate to shield one from liability on the one hand, or always to charge him with it on the other. The usual question is, whether the injury resulted from some act done outside the property injured, and is the natural and probable consequence of the act or thing complained of. If so, it is a nuisance, however lawful in itself, and however high a degree of care or skill may have been exercised to prevent the injury.²

SEC. 131. In *Cahill v. Eastman*, 18 Minn. 324; 10 Am. Rep. 184, this doctrine is well illustrated. In that case, the defendant, prior to October 4, 1869, for some purpose that does not appear in the report of the case, dug a tunnel six feet high from the lower end of Hennepin island in the Mississippi river, under the entire length of the island and for a distance of three hundred feet under the bed of the river and mill pond above the upper end of the island, through the hard sand under the lime stone strata, and at a depth of more than thirty feet below the level of the bed of the river above the falls. On the 4th of October, 1869, the water of the river burst into the tunnel, at the upper end of it, and rushed through it in great volumes, filling it up and rending the rocks, and tearing away the ground to a considerable extent on the top and sides, for its entire length. The flow of water through the tunnel was thereafter mostly stopped. On the 8th of January following, the plaintiff purchased a certain interest in Hennepin island and operated a mill upon the

¹ *Panton v. Holland*, 17 Johns. (N.Y.) 72. ² *Thurston v. Hancock*, 12 Mass. 220.

mill-pond above referred to. In April, 1870, during an ordinary freshet, the water again burst into the tunnel, filling it, and rushing through it in such force and volume that it mashed out and undermined the lower end of the island between the tunnel and the eastern shore on which the plaintiff's mill stood, from the mouth of the tunnel to the plaintiff's mill, and also washed out and undermined certain land over which the plaintiffs had a right of way, under which their mill stood, which is the injury complained of. There was a verdict for the plaintiff in the lower court, and the question came before the supreme court for final revision. The defendant insisted that no recovery could be had in the case without proof of negligence on his part in the construction of the tunnel. The court, however, conceding to the defendant all the care and skill that a prudent man would exercise in such a work, held that the question of liability in such a case is not dependent upon the question of care or want of care on the part of the person doing the act complained of. The tunnel, though lawful in itself, was only lawful so long as it resisted the pressure upon it, and the defendant was bound, *at his peril*, to construct it so that it should not give way. The act of constructing it, being an interference with the natural condition of the bed of the stream by a withdrawal of its support, was a *nuisance*, and the defendant was liable for all the natural and probable consequences that flowed therefrom.

SEC. 132. There is a class of cases where the question of negligence is material. Where the legislature has authorized the doing of an act which would otherwise be a nuisance, the person or company so authorized to do the act, if in the exercise of the highest degree of care and skill, is shielded from liability for damages that ensue, if the act producing the damage comes fairly within the scope of the act. Thus it has been held that an action may be maintained against an incorporated water-works company where the workmen employed to lay the pipes, by the contractor, performed the work in such a negligent manner that an individual passing along the street receives an injury, for a company authorized by the legislature to do an act which may result in

¹ *Matthews v. London Water Works Co.*, 3 Camp. 403; *Tremain v. Cohoes Co.*, 1 N. Y. 163.

mischief if not properly done, is bound to the exercise of the highest precaution to prevent such results.¹ When a company for the purposes of their business are authorized to take up the pavement of the street they are bound at their peril to replace it in a firm and substantial manner, and if the stones are replaced in such a manner that a person stepping upon them, or a team passing over them, sustains an injury, they are liable therefor.² But, if a person or corporation exceeds the powers conferred by the legislature, and does an act that is not within the scope of the powers granted, their acts are a nuisance, and no degree of care or skill will shield them from liability for all injuries that result therefrom.³ In *Hay v. Cohoes Co.*, 1 N. Y. 159, the defendants were authorized by the legislature to dig a canal to supply water for their works, and in carrying out the enterprise, they blasted the rocks found in the line adopted by them for the canal. Pieces of rocks were thrown by the blast against the plaintiff's house, rendering its occupancy not only uncomfortable but absolutely dangerous, and seriously damaging the building. The court held that the act of the legislature did not authorize the company to do an act which would injure the property of others, and that the blasting of the rocks in the vicinity of the plaintiff's house, which endangered the safety of those residing there, or damaging the property, was a nuisance, and no degree of care or skill exercised in the work would shield them from liability. In *Tremain v. Cohoes Co.*, involving the same questions, and which was an action for injuries arising from the same cause, GARDNER, J., said: "How the defendants performed their work is of no consequence; what they did to the plaintiff's injury, is the sole question."

SEC. 133. In *Phinzey v. The City of Augusta*, 47 Ga. 263, the city brought water into a canal erected for that purpose, to be applied for manufacturing uses. The canal was built of sufficient strength, but the water conveyed therein was brought from a distant stream and would not have flowed into the city except for

¹ *Weld v. The Gas-light Co.*, 1 Starkie, 189.

² *Drew v. The New River Co.*, Craig & P. 754.

³ *Renwick v. Morris*, 3 Hill (N. Y.), 621; *Com. v. Ruggles*, 10 Mass. 391; *Mills v. Hall*, 9 Wend. (N. Y.) 315.

the canal, and its diversion there by the defendants. Upon the occasion of a severe freshet, the water in the canal raised to such a height that the city was in danger of being seriously inundated therefrom. To prevent this calamity, the water was allowed to escape through the sewer pipes, and by being subjected to this severe and extraordinary strain, some of the pipes gave way, and the plaintiff's premises were thereby injured. The court held that the city having brought the water where it would not have come except for their acts, thereby created a nuisance, and were bound, at all hazards, to keep the water in the canal. That the sewer pipes might properly be subjected to the burden of discharging the surface water that *naturally* would flow through them, but that, not even to save the city from inundation, could the authorities lawfully let the water from the canal into the pipes. And *this*, upon the principle that when one brings that upon his premises which, if it escapes, *must* injure another, he is bound, at all hazards, to keep it in, and no degree of care or skill will save him from liability, and this, even though the promoting cause of the injury be the action of the elements.¹

SEC. 134. When a person is authorized to do an act upon another's premises the natural effect of which is to endanger the lives and property of those giving the authority, the person so authorized to do the act is bound to provide and maintain all suitable and proper safeguards against injurious results therefrom. The law presumes that the authority given is coupled with that condition. Thus when the owner of the surface conveys the minerals beneath to another with the privilege of sinking a shaft upon his premises, the owner of the minerals is bound to fence the shaft, and provide and maintain suitable and sufficient barriers to prevent either persons traveling there, or cattle and sheep depasturing in the field, from falling into the shaft;² and this liability continues so long as the person has dominion and control over the shaft.³ And when the mine owner abandons his control and dominion over the shaft, it is the duty of the land-owner

¹ *Montgomery v. Fleming*, 2 Stuart, 53; *Leslie v. Pound*, 4 Taunt. 649. 519, establishes the same rule. See chap. on Highways, *infra*.

² *Williams v. Graucott*, 4 B. & S. 3; *Sybray v. White*, 1 M. & W. 435; 149; *Hadley v. Taylor*, L. R., 1 C. P. 149; *Walter v. Dunk*, 4 F. & F. 298.

himself to fence the shaft, or he will be liable for injuries received by persons lawfully traveling there, by falling down the pit. The same rule also applies to wells, quarries, or any dangerous excavations upon one's premises.¹ And this is so, even though the interests of the occupier are better served by keeping the quarry or excavations unfenced, and though there is no obligation as between him and his servants to fence it.² And where excavations are made so near to a highway, that a person passing along by slipping may be precipitated into it, the occupant of the premises in which the excavation exists will be liable for all the injuries sustained thereby. And it seems that liability exists, even though the duty of fencing the excavation rests upon some other person. But this must be understood as subject to the qualification, that the person injured was himself guilty of no fault or negligence. A person cannot rush blindly upon danger and then charge the responsibility of his injuries upon another. When a man is traveling upon a highway he is bound to the exercise of reasonable care, and when he is upon strange premises either by day or night he is bound to keep a proper lookout, and cannot recover for injuries that might have been avoided by the exercise of reasonable care.

SEC. 135. A man's dominion over his own premises is qualified to the extent that his use of them must be reasonable, and such as not directly calculated to produce injury to others.³ Thus a man may not even for the protection of his property set dangerous traps or spring guns upon his premises in such a situation that they may do injury to another, who goes upon the premises either lawfully or unlawfully without notice of their existence.⁴ But it seems that the *intent* with which the act is done is held to qualify the liability for injuries arising from such causes to animals.⁵ Thus in *Johnson v. Patterson*, 14 Conn. 1, it was held that, when the defendant threw poisoned dough upon his premises

¹ *Pickard v. Smith*, 10 C. B. (N. S.) 298; *Indemaur v. Dames*, L. R., 1 C. P. 470; *Bishop v. Trustees*, 1 Ell. & Ell. 274.

697; *Hardcastle v. So. York R. R. Co.*, 4 H. & N. 67; *Williamson v. Fairer*, 32 L. J. (Ex.) 173.

² *Brinks v. R. R. Co.*, 23 L. J. (Q. B.) 26; *Harmsell v. Smyth*, 29 L. J. (C. P.) 203; *Welter v. Dunk*, 4 F. & F.

³ *Barnes v. Hathorn*, 54 Me. 124.

⁴ *Bird v. Holbrook*, 4 Bing. 628; *Deane v. Clayton*, 7 Taunt. 489; *Illott v. Wilkes*, 3 B. & Ald. 304.

⁵ *Jordin v. Crump*, 8 M. & W. 787.

with intent to kill the plaintiff's hens, which trespassed upon his premises, he was liable for the value of the hens killed, although he gave the plaintiff notice that if he did not confine his hens he should poison them. So too, in England, where by statute the setting of dog traps, man traps and spring guns is made unlawful, except for the destruction of vermin, or of dogs in pursuit of game, it is held unlawful and actionable to bait the traps with a view to drawing dogs to the traps;¹ but no liability exists for dogs or other animals that are killed or injured by running on to unbaited traps, that are set for lawful purposes and with no wrongful intent.²

SEC. 136. There is no question but that a man may lawfully set spring guns or any other dangerous traps in his dwelling-house or store, to protect his house at night time from burglars, but he must see to it that they are so arranged as not to inflict injury upon those who go there for lawful purposes, and seek admission in the usual and lawful modes. Thus, if a gun or other dangerous implement should be so arranged that a person coming to the premises, upon applying the knocker to the door, or in pulling the bell knob, should receive an injury, there can be no question but that the person setting or causing the gun or other weapon to be so set as to produce the injury would be liable for all the consequences. The right must be exercised in such a way as to produce injury alone to those seeking to gain admission by extraordinary and unlawful methods.³

SEC. 137. If a person keeps open a path to his house for the approach of all having occasion to call there, makes excavations near the path, or places any dangerous obstacle there whereby a person is injured in traveling over the path, he is liable for the injury even though the person is a trespasser. By making the path as an approach to his house he thereby has given implied permission to all persons having occasion to do so, to go over it to his house, and he cannot shield himself from liability, upon the ground that they had no business there.⁴ He is treated by

¹ *Townsend v. Wathen*, 9 East, 277. B. 204; *Gandset v. Egerton*, L. R., 2 C.

² *Jordin v. Crump*, 8 M. & W. 787; P. 371; *Lancaster Canal Co. v. Barnaby*, State v. Moore, 31 Conn. 479. 11 Ad. & E. 243; *Jarvis v. Dean*, 11

³ *Blythe v. Topham*, 1 Rolle's Abr. 88; Moore, 354; *Indemaur v. Dames*, L. R., Cro. Jac. 158; *Stone v. Jackson*, 16 C.

maintaining the path to hold out an invitation to all persons to use it who have reasonable grounds to do so, and he is bound, at his peril, to keep it in a safe condition. The degree of liability for neglecting to fence off dangerous places, is the same as that of a shop-keeper who invites the public to his shop, and leaves his trap-doors or other dangerous traps in an insecure and unsafe condition.¹

SEC. 138. When by grant or prescription the duty is imposed upon one land owner to maintain a fence for the benefit of the adjoining land, the person upon whom this duty rests, is liable to the adjoining owner for all damages that are sustained by him by reason of his neglect to maintain the fence in a proper state of repair. If, by reason of a defective condition of the fence, his cattle or sheep escape, or the cattle and sheep which he has taken to depasture there escape, the person whose duty it was to keep up the fence is liable for all the damages that ensue. If his cattle, or those which he has taken to depasture, escape through the defective fence, and fall into a pit or otherwise are killed or injured, he must respond in damages for the injury thus sustained as well as for all injuries that result therefrom.²

SEC. 139. As between a landlord and his tenant, there is no obligation upon the landlord to repair the building in the absence of an express covenant to that end.³ It has been held that, in the absence of such a covenant, the landlord is not responsible to the tenant for damages that he may sustain from a leaky roof, insecure chimney or other defects in the building.

SEC. 140. In *Gott v. Gandy*, 2 Ell. & Bl. 847, the plaintiff rented a dwelling-house of the defendant, and occupied it with

1 C. P. 274; *Corby v. Hill*, 4 C. B. (N. S.) 556; *Hodman v. R. R. Co.*, 33 L. J. (Q. B.) 240; *Gallaher v. Humphrey*, 10 W. R. 664; *Balch v. Smith*, 7 H. & N. 736.

¹ *Jarvis v. Dean*, 11 Moore, 354; *Indemaur v. Dames*, L. R., 1 C. P. 274; *Lancaster Canal Co. v. Parnaby*, 11 A. & El. 243.

² *Rooth v. Wilson*, 1 B. & Ald. 59; *Powell v. Salisbury*, 2 Y. & J. 391.

³ *Johnson v. Dixon*, 1 Daly (N. Y. C. P.), 178; *Taylor's Landlord and Tenant*,

163; *Hart v. Windsor*, 12 M. & W. 85; *Monk v. Cooper*, 2 Strange, 763; *Balfour v. Weston*, 1 T. R. 310; *Ainsley v. Rutter*, cited in above case; *Tauner's Case*, Dyer, 56, a; *Paradise v. Jane*, Alleyn, 26; *Carter v. Cummings*, cited in 1 Chan. Ca. 84; *Westlake v. De Graw*, 25 Wend. (N. Y.) 669; *Howard v. Doolittle*, 3 Duer (N. Y.), 464; *Port v. Vitter*, 2 E. D. Smith (N. Y. C. P.), 284; *Mayer v. Muller*, 4 Hilt. (N. Y. C. P.) 491.

his family. The chimney became weak and ruinous and fell through the roof and injured the furniture and family of the plaintiff. The court held that an action would not lie against the landlord for the damages. But where, after the execution of the lease and before the term begins, the premises are, by the wrongful act of the landlord, rendered untenable, the lessee is not bound by the lease.¹

SEC. 141. Either the landlord or the tenant, or both, are liable to indictment by the public for maintaining a ruinous house in a public place, or a house in a condition that endangers the safety of the public. But if the defects are due to the original faulty construction of the house, the landlord is alone liable. So, too, for injuries arising to adjoining owners therefrom.² Where the houses are in good repair when the tenant goes into possession, and become ruinous while in the tenant's possession, the tenant alone is liable for the consequences, public or private.³

SEC. 142. The blasting of rocks by the use of gunpowder or other explosives in the vicinity of another's dwelling-house is a nuisance,⁴ or in the vicinity of a highway;⁵ and the person doing the act, or causing it to be done, is liable for all injuries that result therefrom. So, the keeping of gunpowder,⁶ nitro glycerine,⁷ damp jute,⁸ or other explosive substance in large quantities in the vicinity of one's dwelling-house or place of business, is a nuisance *per se*, and may be abated as such by action at law, or by injunction from a court of equity; and if actual injury results therefrom, the person keeping them is liable therefor, even though the act occasioning the explosion is due to other persons and is not chargeable to his personal negligence.⁹ So, too, upon

¹ *Cleves v. Willoughby*, 7 Hill (N. Y.), 83.

² *Ladd v. Flight*, 9 C. B. (N. S.) 377; *Rex v. Pedly*, 1 Ad. & El. 822; *Bel-lows v. Sackett*, 15 Barb. (N. Y.) 96.

³ *Payne v. Rogers*, 2 H. & Bl. 349; *Leslie v. Pound*, 4 Taunt. 648; *Robbins v. Jones*, 33 L. J. C. P. 1; *Bishop v. Trustees*, 1 Ell. & Ell. 697; *Chantler v. Robinson*, 4 Exchq. 163.

⁴ *Hay v. Cohoes Co.*, 1 N. Y. 157; *Tremain v. Cohoes Co.*, id. 163.

⁵ *Reg. v. Mutter*, Leigh's Cases, 491.

⁶ *Myers v. Malcolm*, 6 Hill (N. Y.), 293; *Wier v. Kirk*, Phila. Law Times, No. 1, vol. 1, p. 63.

⁷ *Cuff v. Newark & N. Y. R. R. Co.*, 35 N. J. 17; 10 Am. R. 205.

⁸ *Hepburn v. Lordon*, 2 H. & M. Ch. 345; *Reg. v. Lister*, 3 Jur. 570; *Crowder v. Tinkler*, 19 Ves. 617.

⁹ *Myers v. Malcolm*, 6 Hill (N. Y.), 292; *Hay v. Cohoes Co.*, 1 N. Y. 159.

principle, a loaded gun is regarded as a nuisance, and any person who, by its use in a public place, injures another, is liable therefor. So, too, if he intrusts it to an incompetent person he is liable for all the consequences that result therefrom; or if he leaves it exposed in a careless situation where others are liable to come in contact with it, he is liable if actual injury results therefrom.¹ The rule in reference to such injuries is, that if the wrong and legal damages are known by common experience to be the natural and ordinary sequence of an act, and that damage, naturally, according to the ordinary course of events, follows the wrong, the wrong and damage are sufficiently concatenated, as cause and effect to support an action.² In *Vanderburgh v. Truax*, 4 Denio (N. Y. S. C.), 464, the defendant had a quarrel with a boy, and picking up a pick-axe pursued him through the street, and the boy, to escape from his pursuer, ran into a wine store, and upset a cask of wine. In an action against the pursuer, it was held that he, and not the boy, was liable for the damage. In *Scott v. Shepard*, 3 Wilson, 403, the defendant threw a lighted squib into the market house, in the market place, during a fair, and the squib falling upon a gingerbread stall, the stall-keeper, for his own protection, threw it across the market place, where it fell upon another stall, where it was thrown off and exploded near the plaintiff's eye, and blinded him. DEGRAY, C. J., in delivering the opinion of the court, said: "All the injury was done by the first act of the defendant; that, and all the intervening acts, are to be treated as only one act"

SEC. 143. There are a class of nuisances that arise from an interference, by force or fraud, with the free exercise of another's trade or occupation, by preventing persons by threats from trading with the plaintiff,³ or by posting placards in the vicinity of the plaintiff's place of business, calculated to bring the plaintiff into contempt and to prevent people from trading with him,⁴

¹ *Illidge v. Goodwin*, 5 C. & P. 190; *Bell v. Midland R. R.*, 30 L. R. 273; *Lynch v. Nurdin*, 1 Q. B. 29; *Scott v. Springhead Spinning Co. v. Riley*, L. R., 6 Eq. Cas. 551; *Keeble v. Heckler*.

² *Gerhard v. Bates*, 2 Ell. & Bl. 490. in *Gill*, 11 East, 576 n.

³ *Tarleton v. McGamley, Peake*, 270; *Gilbert v. Mickle*, 4 Sand. Ch. (N. Y.) 357.

or intimidating one's workmen and preventing them from remaining in his employ,¹ or threatening to bring suits against people who come to buy the plaintiff's goods, thus injuring his trade.² In the case of *Springhead Spinning Co. v. Riley*, 6 L. R. (Eq. Cas.) 551, it appeared that the defendant and others, who were members of a trades' union, issued placards, which they caused to be posted in the vicinity of the plaintiff's mills, the direct and natural effect of which was not only to cause the workmen there engaged to leave their employ, but also to prevent others from engaging with them. Sir R. MALINS, V. C., in granting the injunction, among other things, said: "This court will interfere to prevent the destruction or deterioration of property, from whatever acts they arise." So it is a nuisance unlawfully to obstruct the free access of people to a man's place of business.³ So, too, where a person has an exclusive privilege conferred upon him to exercise a particular business in a certain district, it is a nuisance for any other person to set up a similar business within the limits of his privilege.⁴ But the privilege must be one recognized by the law. Where one has a grant from the legislature for a bridge over a stream, with a provision that no other bridge shall be erected within two miles of it, the construction of another bridge within those limits is a nuisance, and the parties erecting it are liable for all the damages that result therefrom, whether from loss of tolls or actual injury to the bridge itself.⁵

SEC. 144. It may be given as a general proposition, that any thing constructed on a person's premises which of itself, or by its intended use, interferes with the rights of a neighbor, or with the proper enjoyment of his property, is a nuisance. In *Grady v. Walsner*, 46 Ala. 351, the defendant's premises and the plaintiff's adjoined each other, being separated by an ordinary partition. The defendant erected in his house a cooking range so near the partition wall that the ordinary use of the range injured the

¹ *Springhead Spinning Co. v. Riley*, L. R., 6 Eq. Cas. 551.

² *Garrett v. Taylor*, Cro. Jac. 567.

³ *Bell v. Midland R. R. Co.*, 40 L. J. (C. P.) 273.

⁴ *Bridgland v. Shapter*, 5 M. & W. 375; *Mayor v. Ensor*, L. R., 4 Exch. 335; *Yard v. Ford*, 2 Wm. Saunders, 174.

⁵ *Chenango Bridge Co. v. Lewis*, 63 Barb. (N. Y. Sup. Ct.) 111.

goods in the plaintiff's store by reason of the heat arising therefrom, and rendered the plaintiff's premises uncomfortable. The court held that the use of the range by the defendant in that way was a nuisance, and that the landlord who erected the range was liable for the injuries resulting therefrom, even though the premises were in the possession of a tenant when the injury was done.

SEC. 145. Among the instances referred to in all the old works in which the subject of nuisances is touched upon, is that of the negligent construction of a hay rick near the boundary of one's land, and *Vaughn v. Menlove*, 3 Bing. (N. C.) 468; 3 Hodges, 51, 32 E. C. L. 468, is cited, in which the defendant was sued for injuries of the erection of a hay rick by the defendant near the plaintiff's premises, in such a negligent and improper manner, that it ignited from spontaneous combustion and set fire to and consumed the plaintiff's buildings. It appeared that the hay was in a damp and half cured condition when placed in the rick, and the defendant's attention was then called to it. The court instructed the jury that it was a question for them to determine whether the defendant, in view of all the circumstances, was guilty of gross negligence, viewing his conduct with reference to that care and caution that a prudent man would exercise under the same circumstances, and that it was no defense to say that he acted *bona fide* and according to his best judgment. It will be observed that the nuisance in this case consisted not in an *omission* of the defendant to do the act, but that the injury resulted from the original wrongful act; and is of that class referred to in a previous section where the act *might* result injuriously to another rather than to the class which *must* so result. In the case of *Tuberville v. Stamp*, 1 Salk. 13, the defendant collected together the weeds and other debris in his grounds and set fire to them. By his failure properly to watch the fire it ran over upon the land of the plaintiff and injured his property. The court held that the defendant was liable for all the consequences of his act, *unless* the damage was due to a sudden blast which could not be foreseen that sent the fire upon the plaintiff's premises. The true doctrine in reference to this class of cases I apprehend is

this: If a fire is set in the vicinity of buildings for the purpose of consuming waste materials collected upon an urban lot, the original act is wrongful in itself, and the person setting it is bound at his peril to confine it to his own premises. The principles applicable to the burning of a fallow *cannot* be extended to this class of acts, and if a fire is set, whether it is carried upon the neighbor's premises by a high wind or extends there in consequence of its negligent management, is of no account in determining the question of liability; the original act is wrongful in itself, and in violation of the rights of others if buildings are so near the fire as to be endangered by it.

SEC. 146. The principle applied to the hay rick is also applicable to the improper use of buildings. If a person is chargeable with negligence in putting hay into a barn in an improper condition, whereby it ignites to the damage of others, he is clearly guilty of a nuisance and liable for all the consequences that ensue. So if a person deposits and keeps, in a negligent manner, damp jute,¹ oiled rags, or any species of property, the natural tendency of which is to ignite by spontaneous combustion, if improperly managed, the occupant of the premises is clearly liable for all the consequences that ensue from a failure on his part to exercise that degree of care and caution that a prudent man would exercise under the circumstances.² And if the article is one of a highly inflammable or explosive character, it is *wrongful* and a *nuisance* to keep it at all in the vicinity of other buildings, and no degree of care or skill in the management of it would shield him from liability.³

SEC. 147. So it is held to be a nuisance for a person to exercise an unruly horse in a public place, and any person doing so is liable for all injuries inflicted by the horse,⁴ but in order to create liability it would seem that the owner must be aware of its vicious propensities.⁵ In *Cox v. Burbridge*, the defendant turned his horse into his field from which it strayed into the Highway, and

¹ *Hepburn v. Lordon*, 2 H. & M. Ch. 345.

² *Myers v. Malcolm*, 6 Hill (N. Y.), 292.

³ *Cuff v. Newark & N. Y. R. R. Co.*, 85 N. J. 17; 10 Am. Rep. 205.

⁴ *Michael v. Alestree*, 2 Lev. 172.

⁵ *Cox v. Burbridge*, 9 Jur. (N. S.) 970.

there kicked a child who was lawfully in the highway. The court held that the defendant could not be made responsible for the injury unless he was aware that the horse was likely to commit such acts. But the doctrine of this case does not commend itself to courts or the profession, as being consistent with reason or sound policy. The horse was *unlawfully* in the highway, the child was *lawfully* there, and there seems to be no good reason why the owner or keeper of the horse should not be responsible for the injuries inflicted upon the child while so unlawfully at large. Judge REDFIELD, in an article entitled "Recent developments in English Jurisprudence," 4 Am. Law Reg. (N. S.), pp. 140-1, severely criticises this case, and gives it, as his opinion, that knowledge of the propensities of the horse, under such circumstances, is not essential to fixing liability for injuries inflicted.

SEC. 148. While a man may keep horses affected by glanders or other contagious diseases upon his own premises, yet he has not a right to allow them to go at large in the street, or to drink at public watering places; and if he does so he is answerable as for a nuisance to any person sustaining damage therefrom.¹ And for a person to sell a horse affected with glanders, knowing it be so affected, is so far a fraud and opposed to sound policy that he may be made liable, even though there be no warranty.² A person may keep horses afflicted with glanders upon his own premises, or sheep afflicted with the foot-rot, but he must keep them there at his peril; for, while he will not be liable for a spread of the disease therefrom among his neighbors' horses or sheep so long as he keeps them on his own land, yet if they escape upon the land of another, he will be liable for all the damage from a spread of the disease resulting from their escape.³ But this is only the case when the duty is imposed upon him to fence the lands. When the duty to fence is upon another, or when the lands are left common, he is only bound to give those interested notice of the diseased state of his cattle and flocks, and that he intends to turn them into his pastures.⁴

¹ Mills v. N. Y. & H. R. R. Co., 2 Rob. (N. Y. Sup. Ct.) 326.

² Blakemore v. Bristol & Ex. R. R. Co., 8 Ell. & Ell. 1051; Anderson v. Buckton, 1 Str. 192.

³ Fisher v. Clark, 41 Barb. (N. Y. Sup. Ct.) 329; Anderson v. Buckton, 1 Str. 192.

⁴ Walker v. Herron, 22 Tex. 55.

SEC. 149. It is a nuisance for a person to make an erection in the vicinity of another's building, and negligently and carelessly carry on a business there that directly exposes his property to loss or damage from fire. Thus in *Varney v. Thomson*, 13 F. C. (Scotch) 491, the defendant erected a building with a thatched roof, and used it as a smith's forge, in the immediate vicinity of the plaintiff's residence and other thatched houses. The sparks falling upon the roofs from the chimney, constantly exposed the plaintiff's property to damage from fire. The court restrained the defendant from using his building for that purpose.

In *Derwoody v. DesArc*, 18 Ark. 252, the defendant was the owner of an old house, which had for a long time been unoccupied and was left open, and had become a resort for tramps and persons smoking pipes at all hours of the day and night. Being in the vicinity of other buildings, they were thereby exposed to imminent danger from fire. The city government directed its destruction as a nuisance. In an action against the parties pulling it down, the court held that, by reason of the uses to which the building was devoted, and the danger from fire therefrom by other buildings in the vicinity, it was a nuisance, and any person interested was justified in destroying it, if necessary, to prevent the nuisance.¹

SEC. 150. But in order to render a building a nuisance, by reason of the exposure of other buildings to danger from fire, the hazardous character of the business must be unmistakable, the danger imminent, and the use of such an *extraordinary* and *hazardous* character as to leave no doubt of the nuisance. The mere fact that the business carried on there is of a hazardous character, and largely increases the rates of insurance upon surrounding property, is not sufficient; it must appear not only that the business or use to which the building is applied is hazardous, but also, that it is conducted in such a careless manner, or in such a locality, as to make injurious results probable.² In *Duncan v. Hayes*, the plaintiff, among other grounds, urged that the defendant should be enjoined from erecting a steam planing and saw-mill, because it exposed her buildings to fire,

¹ *Duncan v. Hayes*, 22 N. J. 25.

² *Varney v. Thomson*, 13 F. C. (Scotch) 491.

and largely increased the rates of insurance upon property in the vicinity. ZABRISKIE, C., said: "I know of no precedent for an injunction against any business on account of an increased risk from fire to the adjoining buildings." The court evidently did not mean to be understood as saying that a case could not arise where a court of equity would not interfere by injunction, where the nature of the business, the character of the surrounding buildings, and the manner in which the business is conducted, is such as to make the hazard so extreme as to make it *probable* that ill results would ensue. But cases of this character must necessarily be rare, and the exception, rather than the rule.

SEC. 151. In *League v. Journey*, 25 Texas, 172, the plaintiff brought an action for the abatement of a machine shop near his residence, as a nuisance, among other things, for the reason that because of the fires kept in the shop, and the large amount of combustible materials kept there, his buildings were subjected to increased danger from fire. There was no evidence that the fires were not properly secured and properly managed. A verdict having been rendered for the defendant upon hearing in the supreme court the judgment was sustained. BELL, J., saying, "The plaintiffs alleged that the danger to their residences from fire was increased because of the fires that are kept in the defendant's shop. * * Some witnesses thought that the danger from fire to the surrounding houses was increased because of the business of the shop; others thought that it was not. * *. The assignment of error leaves no question as to the correctness of the charge, and we are of opinion that the question was fairly, fully, and clearly submitted to the jury." The judge below left it as a question for the jury to find whether the fires in the shop really increased the danger of the surrounding buildings to fire, more than would result from the ordinary uses of property for such purposes. The court do not pass directly upon the question as to *what degree of hazard* from fire must be proved in order to make a use of property a nuisance, but there can be no question that it must be such an *extraordinary* and *careless* use as makes dangerous results probable rather than possible.¹ In the case of *Varney v. Thom-*

¹ *Hepburn v. Lordon*, 13 L. T. (N. S.) 59; *Reg v. Lister*, 1 Dears & B. 209.

Ryan v. Copes, 11 Rich. (S. C.) 217; *Cartwright v. Gray*, 12 Grant's Ch. Ca. (Ont.) 400.

son, previously referred to, the question of nuisance was not made to depend mainly upon the fact that the building in which the defendant carried on his trade was itself, by reason of its thatched roof, and the danger from its being consumed in that way by the falling of the sparks thereon from the forge rendered imminent; neither was it made to depend entirely upon the fact that the building was contiguous to others, for, if the shop had been at such a distance from other buildings, that there was no danger to them to be apprehended from the sparks arising from the forge, the defendant had a right to carry on his trade as he chose, no matter how much his own property was endangered, but the surrounding buildings being within such an easy distance from the forge as to bring them within the sphere of danger from ignition by the descent of sparks thereon from the forge, by reason of the thatched roofs, was clearly an unlawful use of property by the defendant, for, while he might do with his own property as he saw fit, yet, he could not lawfully so use it as to injure the rights of others or endanger their property. If the roofs of the surrounding buildings had been slate rather than straw, the use of the forge might not have been unlawful nor a nuisance. Therefore, in cases of this kind, in the light of what authorities we have upon the subject, it is important not only to establish the fact that the danger from fire is increased by the use of the building in which the fires are kept, but also that, from the situation and character of the surrounding buildings, they are directly exposed to conflagration, and that the exposure is of such a degree and character as to make that result a natural and probable consequence of the use, or that the use is such that by reason of the sparks sent forth from the fires upon the roofs of surrounding buildings, they are subjected to imminent risk and danger of destruction or damage.

The careless use of a stove in which fires are kept in a building immediately adjoining other frame houses so that the burning of one would endanger another, would make such use of the stove a nuisance, because it endangers the property of others, and is in violation of their rights, for no man has a right to use his property in a careless and negligent manner when such use endangers the property or persons of others. But if the adjoining

buildings are of such materials and so constructed that the burning of the building in which the stove is so carelessly used, would not probably produce damage to them, the use of it in that way would not be a nuisance, for the rights of others are not thereby affected. Take another illustration, as a use of stove in a tenement house occupied by numerous persons, can there be any question but that, if fires were built therein under such circumstances, and in such a way as to endanger the building from fire and exposing the property of other tenants, that the use would be held unlawful, and actionable and abatable as a nuisance? Is there any question but that a person thus carelessly making use of this dangerous element to the imminent danger of loss to others, would be held chargeable with liability for all the damages that ensued therefrom? ¹

The use of a steam engine in the heart of a city is not unlawful so long as properly used and managed, and if, from no fault of the person owning or using it, it explodes and does serious damage, no liability for the consequences exists against the owner. But if the engine is out of repair, and in a condition that it ought not to be used, or cannot be used without danger to others, or if it is managed in a careless and negligent manner, it is clearly a nuisance, and even though the owner was not aware of its defective condition, or of its careless and negligent management, he is liable for all the damages that result to others therefrom, if the defect would have been ascertained upon reasonable examination. ² The same doctrine is applicable to fires.

SEC. 152. In this country the doctrine of ancient lights, or rather the acquisition of a right by prescription to have the light enter laterally into the windows of one over the lands of another,

¹ *Buchanan v. Lossee*, 51 N. Y. 476; *Teal v. Barton*, 40 Barb. (N. Y. Sup. Ct.) 137; *Ryan v. N. Y. C. R. R. Co.*, 35 N. Y. 210; *Macon W. R. R. Co. v. McConnell*, 27 Ga. 481; *Rood v. R. R. Co.*, 18 Barb. (N. Y. Sup. Ct.) 80; *Sheldon v. R. R. Co.*, 14 N. Y. 218; *Burroughs v. R. R. Co.*, 15 Conn. 124; *Reading R. R. Co. v. Yieser*, 18 Penn. St. 368; *Vaughn v. Taffe Valley R. R. Co.*, 5 H. & N. 679; *Frankford Turnpike Co. v. Railroad Co.*, 34 Penn. St. 345; *Illinois Cent. R. R. Co. v. Mills*, 42 Ill. 402; *Freemouth v. Railroad Co.*, 10 C. B. (N. S.) 89; *Bass v. Railroad Co.*, 28 Ill. 9. *Lackawanna R. R. Co. v. Doak*, 52 Penn. St. 379; *Fero v. R. R. Co.*, 22 N. Y. 209; *Great Western R. R. Co. v. Haworth*, 39 Ill. 346; *Jones v. Festiniog, L. R. (Q. B.)* 733; *Mosier v. Railroad Co.*, 8 Barb. (N. Y. Sup. Ct.) 42; *State v. Tupper*, 3 Dudley, 135.

² *Buchanan v. Lossee*, 51 N. Y. 476.

has never been adopted. There are a few early cases in which this right was recognized, but latterly the courts have repudiated it as unsound in principle, and unsuited to the habits and rapid growth of the country.¹ In *Parker v. Foote*, 19 Wend. (N. Y.) 309, BRONSON, J., in commenting upon this doctrine, says: "In the case of windows overlooking the land of another, the injury, if any, is merely ideal or imaginary. The light and air which they admit are not the subjects of property beyond the moment of actual occupancy, and for overlooking one's privacy no action can be maintained. The party has no remedy but to build on the adjoining land against the offensive window. In the case of lights there is no adverse user, nor, indeed, any use whatever of another's property, and no foundation is laid for indulging any presumption against the rightful owner. There is no principle, I think, upon which the modern English doctrine on the subject of lights can be maintained. It is an anomaly in the law. It may do well enough for England, but it cannot be applied in the rapidly growing cities and villages of this country without working the most mischievous consequences. It has never, I think, been deemed a part of our law, nor do I find that it has been adopted by any of the States."

SEC. 153. In New Jersey,² Illinois³ and Louisiana,⁴ the English doctrine has been partially recognized, but it is doubtful whether it would now be sustained in the courts of either of those States. Therefore, in this country, no prescriptive right to have the light and air enter the windows of a building laterally over the land of another can be acquired, and in the absence of an express or implied grant to that end, an adjoining owner may build upon his own land so as to completely shut out the light of his neighbor's windows opening upon his land, and no action can be maintained therefor."⁵

¹ *Myers v. Gemmel*, 10 Barb. (N. Y. S. C.) 537; *Klien v. Gehrung*, 25 Tex. 232; *Ward v. Neal*, 37 Ala. 501; *Story v. Odin*, 12 Mass. 157; *Cherry v. Stein*, 11 Md. 1; *Napier v. Bulwinkle*, 5 Rich. (S. C.) 311; *Hay v. Sterrett*, 2 Watts (Penn.), 331; *Pierre v. Fernald*, 26 Me. 436; *Ingraham v. Hutchinson*, 2 Conn. 584; *Morrison v. Marquardt*, 24 Iowa, 63; *Mullen v. Stricker*, 19

Ohio St. 135; *Oregon Iron Co. v. Trulinger*, 3 Oregon, 1.

² *Robeson v. Pittinger*, 1 Green's Ch. (N. J.) 57.

³ *Gerber v. Grabel*, 16 Ill. 217.

⁴ *Durel v. Boisblanc*, 1 La. An. 407.

⁵ *Cherry v. Stein*, 11 Md. 1; *Haversticks v. Sipe*, 33 Penn. St. 222; *Pierre v. Fernald*, 26 Me. 436.

SEC. 154. There are instances in which a right to have the light and air enter the windows of a building over an adjoining lot, may exist: First, by express grant,¹ and secondly, by implied grant,² and when such right is created in either of the modes named an interference therewith is an actionable nuisance. Where a land owner erects a house with windows opening upon the portion of his lot adjoining, and sells the house and the lot upon which it stands, and by the terms of the conveyance covenants not to make any erection upon the adjoining lot that will hide either the light or prospect, this will create a right in the owner of the house and his grantees against the grantor and his grantees to such light and prospect, and any infringement thereof would be a nuisance.³ So, too, when the grant by fair construction can be extended to cover such rights. In *Hills v. Miller*, the plaintiff purchased of the defendant a part of a village lot of four acres in the village of Auburn, and erected a valuable dwelling-house thereon. The defendant Miller retained the balance of the lot, Miller purchased the premises of one Bostwick, and at the time of the conveyance to Miller, Bostwick agreed with him that no building should ever be erected upon a small triangular piece of land owned by him on the east side of Hotel street, at the junction of that and South street, and directly opposite the lot conveyed, and executed a bond to Miller with a penalty, for the faithful performance of the agreement. Miller caused both the deed and bond to be recorded, and afterward sold a part of the premises to the plaintiff, informing him, before the purchase, of the existence of the bond and its provisions. Eight years after the purchase by the plaintiff, the defendant, and the executors of Bostwick's estate, gave a quit-claim deed of this triangular piece of land to the Baptist Church and Society, who proceeded to extend their church over the same. WALWORTH, C., in disposing of the

¹ *Hills v. Miller*, 3 Paige's Ch. (N. Y.) 254; *Western v. McDermott*, 1 L. R. (Eq. Ca.) 499; *Jones v. Jenkins*, 34 Md. 1; *Thurston v. Mink*, 32 id. 487; *Brooks v. Reynolds*, 106 Mass. 31; *Morrison v. Marquardt*, 24 Iowa, 35; *Boyce v. Guggenheim*, 106 Mass. 201; *United States v. Appleton*, 1 Sumn. (U. S.) 492; *Kent's Com.*, vol. 3, p. 448.

² *Thurston v. Mink*, 32 Md. 487; *Jones v. Jenkins*, 34 id. 1; *Lampman v. Wilks*, 21 N. Y. 505; *Oregon Iron Co. v. Trullinger*, 3 Oregon, 1; *Story v. Odin*, 12 Mass. 157; *Morrison v. Marquardt*, 24 Iowa, 35.

³ *Hills v. Miller*, 3 Paige's Ch. (N. Y.) 254.

question, held that the execution of the bond at the same time the deed was executed was, to all intents and purposes, one transaction, and had the same effect as though expressed in the same conveyance, and, that thereby a servitude was imposed upon the triangular strip of land, which inured to the benefit of any purchaser under Miller's title, and that this servitude could not be removed by Miller, as against his grantees.

SEC. 155. Easements to light, by implied grant, may be acquired, but the doctrine, in the different States, seems to be very conflicting. In some States the right is wholly denied,¹ while in others it is made to depend upon the question of necessity,² and in none of them is the right upheld as a mere *convenience* of the granted premises.³ The weight of authority would seem to support the doctrine, that, where A, being the owner of land, erects a house thereon with windows opening upon his vacant land adjoining, and sells the house, reserving the adjoining lot, that this does not create an easement in the purchaser of the house to have the light and air come through those windows, *unless* the easement is *necessary* to supply the building with light, and to its comfortable enjoyment.⁴ The ground upon which this easement by implied grant is predicated, is analogous to that by which a right of way by necessity is created. If there is no other mode of supplying light to the building, as constructed by the vendor, except through those windows, and it is essential to its reasonable enjoyment that the light and air should come through them over the adjoining lot, the law will raise an easement to that extent in favor of the grantee of the house, against the grantor and his assigns.⁵

SEC. 156. So, too, where from a fair construction of the grant, such an easement can be implied, the law will sustain it as incident to the land, but the mere fact that the grantor of premises is also the owner of the adjacent land upon which the windows of the

¹ Mullen v. Stricker, 19 Ohio St. 135.

² Oregon Iron Co. v. Trullinger, 3 Oregon, 1; Morrison v. Marquardt, 24 Iowa, 35; Lampman v. Milks, 21 N.Y. 505; Story v. Odin, 12 Mass. 157.

³ Washburn on Easements, 618.

⁴ Carriers' Co. v. Corbet, 2 D. & S. 360;

Biddle v. Ash, 2 Ashm. (Penn.) 211; Booth v. Alcock, 8 L. R. (Eq. Ca.) 663; Durel v. Boisblanc, 1 La. An. 407; Jackson v. Duke of Granville, 3 De G. J. & S. 275.

⁵ U. S. v. Appleton, 1 Sumner (U. S.) 492.

granted premises open, is not, of itself, sufficient to create or uphold such an easement, unless it is necessary to the comfortable and reasonable enjoyment of the premises.¹ As to what language or condition of things will raise such an easement by implication, must necessarily depend upon the circumstances of each case. In *Collier v. Pierce*² the premises of the plaintiff and defendant were sold at auction the same day. The plaintiff's lot was bid off first, and his deed was prior in point of time to that of the defendant. The piece purchased by the plaintiff had a house upon it, with windows opening upon the lot purchased by the defendant, and received light and air over that lot. There was no reservation of, or reference to, light and air in either conveyance. The defendant *darkened* the plaintiff's windows. In an action therefor the court held that the sale by auction could not be treated as a grant by a proprietor of a part of his estate, retaining to himself another part, but was rather in the nature of a partition, and, *as it did not appear that the light through the windows in question was necessary to the convenient enjoyment of the plaintiff's premises*, the easement could not be regarded as passing by construction.³

SEC. 157. In *Myers v. Gemmel*⁴ the defendant leased to the plaintiff a dwelling-house opening out upon a vacant lot, also belonging to him, over which the light and air had been accustomed to come to the house. While the tenant was in possession of the premises, the defendant erected a building upon this vacant lot, occupying the whole space between the lot and the dwelling, and darkening all the windows on that side of the house. The court held that this was not an actionable injury, and was not in derogation of the defendant's grant, because the law does not attach a right of enjoyment of light as an incident to the occupation of a house unless it exists in the form of dedication to groups or collections of houses so as to partake of the nature of

¹ *Paine v. Barton*, 4 Allen (Mass.), 169; *Brooks v. Reynolds*, 106 Mass. 31; *Carrig v. Dee*, 14 Gray (Mass.), 583; *Curry v. Stein*, 11 Md. 1; *Napier v. Bulwinkle*, 5 Rich. (S. C.) 311; *Lampman v. Milks*, 21 N. Y. 505; *Biddle v. Ash*, 2 Ashm. (Penn.) 211.

² *Collier v. Pierce*, 7 Gray (Mass.), 18.

³ See *Royce v. Guggenheim*, 106 Mass. 201.

⁴ *Myers v. Gemmel*, 10 Barb. (N. Y. S. C.) 537.

a public easement. But the court intimate that if houses were erected around a court, with an open space for light and air, with a common entrance, and open for all the tenants, that this would be held as a dedication for the benefit of all the tenants.

SEC. 158. In *Maynard v. Eshler*¹ the court held that where two estates are conveyed at the same time, to different purchasers, no easement is acquired in favor of either estate for the passage of light and air; *but*, that a person selling a house which opens out upon a vacant lot, also belonging to him, would be estopped from making an erection upon the lot that would obstruct the passage of light and air to the dwelling.'

SEC. 159. In *Morrison v. Marquardt*² the court held that an easement of this character cannot be imposed upon an adjoining lot of the grantor by implication. That in order to set up such an easement, it must arise from express grant, yet, the court intimated that a condition of things might exist, from which such an easement might be implied.

SEC. 160. In *Mullen v. Strickler*,³ the plaintiff and defendant were the owners of adjoining houses separated by a narrow strip of land five feet in width, both deriving title from the same source, and upon the same day, the plaintiff's conveyance being first in point of time. The windows of the plaintiff's house opened out upon this space, and the house received all its light therefrom, although it appeared that windows might be placed in other parts of the house, and light thus obtained, but that the expense would be considerable. The plaintiff's title only extended to the outer edge of the wall of his house on this space, and the defendant proceeded to fill in the space and completely shut off the light from the plaintiff's windows, and darkened his house. In an action to recover for the injury, the court held that no action would lie. That in the absence of an express grant, no easement existed in favor of the plaintiff's house to the light and air over this space. *That such an easement could not be*

¹ *Maynard v. Eshler*, 17 Penn. St. 222.

² *Mullen v. Strickler*, 19 Ohio St.

³ *Morrison v. Marquardt*, 24 Iowa, 85. 185.

implied. In Maryland ¹ such an easement is raised by implication, and the rights of the parties are treated as fixed at the time of severance, and all *apparent* and *continuous* easements (of which light is one) are treated as passing by *implication*, unless otherwise provided by the grant. Thus it will be seen that the doctrine of easements to light, by implied grant, is by no means settled in this country, so that no fixed or definite rules can be adduced that are applicable to any given case, but, in determining the relative rights of parties, resort must be had to the language of the grant, the situation of the property, and the *necessities* of the parties.

SEC. 161. As to what interferences with an easement of this character will amount to an actionable nuisance, the rule would seem to be that any interference therewith that materially diminishes the light or the enjoyment of the easement is an actionable injury.² The party is not restricted to light suitable and sufficient for the business in which he may be engaged at the time when the injury is inflicted, but is entitled to all the light which he had previously enjoyed.³ The *location* of the building will also be considered, whether it is in a populous town, densely settled or in a suburban district. The mere diminution of light is not necessarily actionable, but when the diminution is such as to impair the ordinary enjoyment or uses of the property, the act creating it is a nuisance, and actionable. The question is always one of degree, and therefore necessarily depends upon the facts of each particular case.⁴ It is not necessarily every building that is erected *near* to another that creates a nuisance, but the *real* question is, is the building erected so near and in such a manner as *materially* to shut out the light. In *Clarke v. Clarke* the plaintiff was the owner of a house, No. 28, in Bristol, which was in the possession of a tenant. At the back of the house was a room with a window looking to the south-west into the garden. The wall between the gardens of the houses was on the left hand side of the window, about four

¹ *Janes v. Jenkins*, 34 Md. 1; *Thurston v. Mink*, 32 id. 487.

² *Yates v. Jack*, 1 L. R. (Eq. Ca.) 295; *Jackson v. Newcastle*, 33 L. J. (Ch.) 698; 10 Jur. (U. S.) 688; *Tapling v. Jones*,

18 W. R. 617; 11 Jur. (U. S.) 309; *Clarke v. Clarke*, 1 L. R. (Eq. Ca.) 16.

³ *Yates v. Jack*, 1 L. R. (Eq. Ca.) 295.

⁴ *Clarke v. Clarke*, 1 L. R. (Eq. Ca.) 16; *Johnson v. Wyatt*, 2 DeG. J. & S. 18.

feet from it and about eleven feet high, running in a direction nearly perpendicular to the window. In 1864 the defendant began to erect some buildings in his garden for photography, running parallel to the garden wall, about three feet from it, and from four feet six inches to eleven feet above the wall. These buildings, though not opposite the window, were thus nearly due south of it, and obstructed the light and sun during the winter months. The window in question was a lofty window reaching from the ceiling to the ground, and between ten and twelve feet high. The garden extended about twenty-five yards in a straight line from the window, and was five or six yards wide. The aspect was south-west, and the sun from morning until about half-past twelve each day shone over the wall, before the erection of the defendant's buildings, and entered the plaintiff's window. The building prevented the direct rays of the sun from falling on the window until they had risen high enough to shine over it. The building was about sixteen feet high. Before the erection of the building the sun's rays entered the window for about two hours each day, but, after its erection, they only entered it for about forty minutes, and the room was thereby rendered considerably darker than it had previously been.

Lord CRANWORTH, L. C., in delivering the opinion of the court, said: "That the effect of the defendant's building is to render the plaintiff's room less cheerful, especially during the winter months, I do not doubt. * * * But I cannot think that this is such an obstruction of light as to amount to a nuisance. It is not, indeed it could not, be contended that the plaintiff's house is shut out from the open sky, or that its occupants are driven to rely on reflected light. The window in question receives greatly more light than usually falls to the lot of inhabitants of towns. As to the direct rays of the sun, if that were material, no complaint is made of the effect of the buildings for nine months of the year. What the plaintiff was bound to show was, *that the buildings of the defendant caused such an obstruction of light as to interfere with the ordinary occupations of life.* * * * The real question is not what is scientifically estimated as the amount of light intercepted, *but whether the light is so obstructed as to cause material incon-*

*venience to the occupiers of the house in the ordinary occupations of life."*¹

SEC. 162. In *Yates v. Jack*² Lord CRANWORTH said: "The right is an absolute, indefeasible right to the enjoyment of the light without reference to the purpose for which it has been used. Therefore, even if the evidence satisfied me, which it does not, that for the purpose of their present business, a strong light is not necessary, and that the plaintiff will still have sufficient light remaining, I should not think the defendant had established his defense unless he had shown that, *for whatever purpose the plaintiff might wish to employ the light, there would be no material interference with it.*"

SEC. 163. Where a right to light is acquired by express or implied grant, or by prescription in localities where such right *can* be thus acquired, the fact that, by reason of changes in the situation of surrounding property, enough light is received so that the light coming over the servient estate can be dispensed with, does not in any measure affect the right of the owner of the dominant estate, to have the light come to him over the servient estate. He is entitled to the light from that point, and the light from other directions in addition thereto. The rule is, that the owner of the servient estate cannot interfere with the rights of the owner of the dominant estate, in any manner so that the light will be essentially diminished from that quarter, without any reference to the increase of light by changes in other surrounding property.³

PRIVATE WAYS.

SEC. 164. All interferences with a right of way that in any measure obstructs or hinders the passage over it, by those in whom the right exists, is a nuisance and actionable as such.⁴ A way is an incorporeal hereditament, and arises either from grant, prescription or necessity. It is a right of passage acquired over another's land. They are either *in gross* or *appendant* to land.

¹ *Johnson v. Wyatt*, 2 D. J. & S. 18; *Isenberg v. East India Co.*, 12 W. R. 450.

² *Dyer's Company v. King*, 9 L. R. Eq. Ca. 438; *Staigh v. Burn*, 5 id. 16.

³ *Yates v. Jack*, 1 L. R. (Eq. Ca.) 298. ⁴ *Thorpe v. Brumfitt*, 8 L. R. (Eq. Ca.) 650; *Salter v. Taylor*, 55 Ga. 310.

A way *in gross*, is a way that is attached to the person, or appurtenant to land;¹ and a way *appendant* is a way that is incident to the estate of the person claiming it and has a terminus thereon. A way *in gross*, being personal, cannot be transferred,² but a way *appendant* is an incident of the estate and passes as an appurtenance by grant.³ A right of way *appendant* to an estate can only be used for purposes connected with that estate, and a right of way *in gross* can only be enjoyed by the person in whom it exists.⁴

Rights of way by grant must be used in accordance with the terms of the grant, and are subject to all the restrictions therein imposed.⁵ The way granted may be inclosed by the owner of the land with gates or bars unless it is expressed to be an open way, or unless such inclosure is inconsistent with the purposes for which it was granted.⁶ But if the way had been laid out before the grant, it will pass in the condition it was when conveyed, and if it was then open the grantor would have no right to set up gates or bars at its entrance.⁷ Unless restricted by the terms of the grant the owner of the land may do any act that does not impair the right of passage over the way granted, or interfere with its free use by the person to whom the right is granted.⁸ A way by prescription is a right of passage over another's land, acquired by adverse user for the statutory period, and presupposes a grant.⁹

§ 165. Ways of necessity can never exist except over one of two parcels of land of which the grantor was the owner when the land in favor of which the way exists was granted, and only arises when the land granted is wholly surrounded by the land of others, and no other access exists.¹⁰ It is appurtenant to the land and passes by grant;¹¹ mere convenience or inconvenience does

¹ Garrison v. Rudd, 19 Ill. 558.

² Washburn on Easements, 232; Alley v. Carlton, 29 Texas, 77.

³ Thorpe v. Brumfitt, 8 L. R. (Eq. Ca.) 650.

⁴ Ackroyd v. Smith, 10 C. B. 164.

⁵ Garraty v. Daffy, 7 R. I. 476.

⁶ Garland v. Furher, 47 N. H. 304; Hoopes v. Alderson, 22 Iowa, 162.

⁷ Welsh v. Wilcox, 101 Mass. 163.

⁸ Schwarzer v. Boylston Market, 99

Mass. 285; Bakeman v. Talbut, 31 N. Y. 366; Bean v. Coleman, 44 N. H. 539.

⁹ Dirrickson v. Springer, 5 Harrington (Mich.) 21.

¹⁰ White v. Seeson, 5 H. & N. 53; Tracey v. Atherton, 35 Vt. 52; Marshall v. Trumbull, 28 Conn. 183; Trask v. Patterson, 29 Me. 499.

¹¹ Wissler v. HERSHEY, 23 Penn. St.

333.

not determine the right to such a way.¹ There must an *actual necessity* exist or the right is not created,² and the right ceases when the necessity therefor ceases.³

SEC. 166. As has been previously stated, when a right of way has been acquired by grant, it must be used according to the terms of the grant,* and, when a right has been acquired by prescription, the right will be commensurate with, and measured by, the use.*

The owner of the land is subject to the restriction that he must do no act upon the land adjoining the way that impairs its usefulness or interferes with the passage over it,* but he may make any reasonable or ordinary use of the adjacent land, provided he does not thereby obstruct the passage over it.* He may sink drains or water-courses beneath it,* he may dig cellars beside it, erect buildings on its borders, with doors opening on to it, if in a city or town,* or with blinds and shutters opening over it,¹⁰ and, unless it is a way by prescription, or he is restricted by his grant, he may build over it,¹¹ or may close it up with bars or gates.¹² The title to the soil is in the owner of the land, and he may maintain trespass against persons using it without right,¹³ or ejectment against those making erections upon or over it.¹⁴

SEC. 167. But any act of the land owner, that obstructs or hinders the right of the person in whom the easement is vested, or interferes with any rights that he has acquired as incident to

¹ McDonald v. Lindall, 3 Rawle (Penn.), 492.

² Hyde v. Jamaica, 27 Vt. 460; Leonard v. Leonard, 2 Allen (Mass.), 543.

³ Abbot v. Stewartson, 47 N. H. 230; Staple v. Heydon, 6 Mod. 1; Holmes v. Seeley, 19 Wend. (N. Y.) 507; Scriven v. Gregorie, 8 Rich. Law (S. C.), 158; Gayetty v. Bethune, 14 Mass. 49; Alley v. Carlton, 29 Texas, 78; Lawton v. Rivers, 2 McCord (S. C.), 445; N. Y. Life Ins. & Tr. Co. v. Milnor, 1 Barb. (N. Y.) 353; Collins v. Prentice, 15 Conn. 39.

⁴ Kirkham v. Sharp, 1 Whart. (Penn.) 323.

⁵ Reynolds v. Edwards, Willes, 282; Smith v. Wiggan, 52 N. H. 112.

⁶ O'Linda v. Lathrop, 21 Pick. (Mass.) 292.

⁷ Underwood v. Carney, 1 Cush. (Mass.) 292.

⁸ Tillmes v. Marsh, 67 Penn. St. 507; Pomeroy v. Mills, 3 Vt. 279.

⁹ Underwood v. Carney, 1 Cush. (Mass.) 292.

¹⁰ O'Linda v. Lathrop, 21 Pick. (Mass.) 292.

¹¹ Schowerer v. Boylston Market, 99 Mass. 285.

¹² Bakeman v. Talbot, 31 N. Y. 366; Huson v. Young, 4 Lans. (N. Y. S. C.) 63.

¹³ Hollenbeck v. Rowley, 8 Allen (Mass.), 476.

¹⁴ Codman v. Evans, 5 Allen (Mass.), 308.

his right of way, is a nuisance, and actionable as such. Thus, if he digs a drain under the way, he is bound to close it up securely, and if he fails to do so, whereby the way is injured, or whereby the owner of the way is damaged, either in his property or person, he is liable for all the damages that ensue.¹ So, if he makes insecure erections upon the way that damage the person in whom the right is vested, or if he makes openings near thereto and does not securely guard them,² or, if he closes up the way or in any manner hinders or obstructs the right of passage over it, he is guilty of a nuisance and chargeable with all the consequences.³

SEC. 168. The grantee of a way, or the proprietor of a way by necessity or prescription, is bound to keep it in repair, and the land owner is chargeable with no duty or liability in that respect.⁴ When the track is fixed by user the right exists in that track, and even though the track becomes impassable, or is obstructed by the owner of the land, the person in whom the easement exists cannot deviate from the old track upon other lands of the person over whose lands the right exists.⁵ But, if the land-owner place obstructions in the way, the owner of the right of way may remove them.⁶ If the owner of the land, or any other person, builds over the way so as to darken it or to obstruct it, or in anywise render it less convenient, he is liable as for a nuisance.⁷ Thus, where the plaintiff had a right of way over the lands of the defendant, for hauling merchandise to his store, and had hoisting apparatus arranged for taking the goods into the store, it was held that the defendant was liable for all damages that resulted from the erection of a building over the way, that cut off these facilities, as the plaintiff was entitled to the use of the way for all the purposes for which he had used it for a period sufficient to acquire a prescriptive right.⁸

¹ *Perley v. Chandler*, 6 Mass. 454.

² *Corby v. Hill*, 4 C. B. (N. S.) 556; *Gallagher v. Humphrey*, 10 W. R. 664; *Shadwell v. Hutchinson*, 4 C. & P. 333.

³ *Kent v. Judkins*, 53 Me. 162; *Batshill v. Reed*, 18 C. B. 696.

⁴ *Wynkoop v. Burger*, 12 Johns. (N. Y.) 222; *Walker v. Pierce*, 38 Vt. 95.

⁵ *Williams v. Safford*, 7 Barb. (N. Y. S. C.) 309; *Boyce v. Brown*, id. 80.

⁶ *Boyce v. Brown*, *supra*.

⁷ *Richardson v. Pond*, 15 Gray (Mass.), 387.

⁸ *Richardson v. Pond*, 15 Gray (Mass.), 387.

SEC. 169. The public may acquire a prescriptive right to use a way as well as a single individual,¹ and where a private way is opened, leading from a public street, and prepared for use the same as a public street, and with nothing to show that it is not such, although it is closed at one end, the public may use the way, and are bound only to the exercise of the same care as in the use of a public street.²

SEC. 170. Where a right of way is vested in several persons, for the benefit of several tenements, neither of the persons in whom the right exists has a right to more than a reasonable use of the way, and any obstruction thereof by one to the detriment of the others, is a nuisance, and actionable.³ If the acts of several persons together, though not done jointly or in concert, operate as a nuisance to a way, when the acts of either alone would not operate as an appreciable injury, an action may be maintained in equity against all of them in favor of one who is injured by the aggregation of their acts.

SEC. 171. In *Thorpe v. Brumfitt*⁴ it appeared that A and B were, in 1853, the owners of the Commercial Inn, at Bradford, and certain lands and buildings adjoining. In the rear of the inn was a yard, occupied with it. The only access to the stable and yard, for horses and carriages was from a street, called the *Tyrells*, along a passage, which was upon part of the land also belonging to A and B. The passage ran northerly from the yard to the street. In July, 1853, A and B sold and conveyed the buildings and land, adjoining the *Tyrells*, to one John Morrell, reserving the way to the inn yard. Subsequently to the sale to Morrell the parties agreed to a change in the boundary between their lands, and a new passage was substituted to the inn yard in place of the old one, which was properly conveyed to A and B by Morrell, and by the terms of which Morrell was to construct the new way and keep it in proper repair. It was also provided that Morrell might erect buildings over the passage-way, so that it was left at least eight feet high. Morrell also reserved a right of way over the pas-

¹ *Richardson v. Pond*, 15 Gray (Mass.), 387.

² *Danforth v. Durell*, 8 Allen (Mass.), 242.

³ *Thorpe v. Brumfitt*, 8 L. R. (Eq. Ca.) 650.

sage for the benefit of his premises, and the right to grant a right of way over the same to others. The new way was constructed and Morrell erected warehouses on the land purchased by him, and also made in the floor-way of the new passage a large opening forming the entrance to a cellar beneath, and covered it with a wooden trap-door. He also made a trap door over it, forming an entrance through the roof covering the passage-way into the warehouse above. He also made side entrances into the warehouses and placed folding doors in them, for the purpose of loading and unloading goods from the passage-way. He let these premises to different parties in 1863, and he was never after that time in the occupation of them. The tenants occupying distinct portions of the premises caused the road-way to be blocked up with carts and wagons, and kept the trap door and folding doors open, and the crane used for hoisting goods, at work for long and unreasonable periods during the busiest hours of the day, when great numbers of persons with vehicles and on foot required to pass to the inn yard. The court held that the obstruction of the way by teams and otherwise, in the loading and unloading of goods upon the passage-way, was a nuisance to the plaintiff for which the defendants were liable to him. Lord Justice JAMES, among other things, said: "The plaintiff only claims a right of way. He does not claim to be entitled to the soil or to prevent the owner of the soil from exercising over it any rights which do not derogate from his grant. The plaintiff cannot complain unless he can prove an obstruction which injures him. The case is not like one of trespass in which a recovery can be had if no damage is proved. Nothing can be much more injurious to the owner of an inn than that the way to his yard should be constantly obstructed by the loading and unloading of heavy wagons. It is said that the plaintiff alleges an obstruction caused by several persons, acting independently of each other, and does not show what share each had in causing it. It is probably impossible for a person in the plaintiff's position to show this. Nor do I think it necessary that he should show it. The amount of obstruction caused by any one of them might not, if it stood alone, give ground for any complaint, though the amount caused by all of

them may be a serious injury. Suppose one person leaves a wheelbarrow standing on a way, that may not cause any appreciable inconvenience, but if a hundred do so, that may cause a serious inconvenience which a person, entitled to the use of the way, has a right to prevent; and it is no defense to any one among the hundred to say, that what he does of itself causes no damage to the complainant."

SEC. 172. It may be stated, generally, that *any* interference with a private way, by the land owner or any other person, that materially interferes with its convenient use, or by the owner of the right of way is a nuisance, to recover the damages for which, an action on the case will lie. The owner of the right cannot maintain trespass against a stranger who interferes with the way, but he may maintain case, and the owner of the land may also have his action of trespass for the injury to the soil. For the general doctrine controlling private ways see Washburn on Easements; where the subject is treated ably and extendedly, see chapters on "Party Walls," "Lateral and Subjacent Support," "Smoke, Noxious Vapors and Noisome Smells," "Highways," "Water," "Pollution of Streams," and "Brick Burning," for further instances of private nuisances

CHAPTER FIFTH.

LATERAL AND SUBJACENT SUPPORT OF LANDS.

SEC. 173. No absolute right to support for soil.

174. The right consists in having the soil left intact.

175. Rule in *Farrand v. Marshall*.

176. Rule in *La Sala v. Holbrook*.

177. The right only extends to the soil itself.

178. Buildings do not deprive one of this right unless they sensibly increase the pressure.

179. Rule in *Brown v. Robbins*.

180. Recovery may be had where structures do not contribute to the injury.

181. Distinction between injury to the soil, and to a wall or structure.

SEC. 182. Rule in *Hamer v. Knowles*.

183. Instances in which injury to buildings may be recovered for.

184. Same subject continued.

185. Division fence not regarded as increased burden.

186. Rule in *Wyatt v. Harrison*.

187. Right ceases when wall is substituted for soil.

188. Rule in *Panton v. Holland*.

189. Rule in *Thurston v. Hancock*.

190. Rule in *La Sala v. Holbrook*.

191. Degree of care required in excavating near foundation walls.

192. Same continued.

193. What acts deprive one of the right of support for his soil.

194. Subjacent support. Right to. Effect of custom.

195. Rule in *Harris v. Ryding*.

196. Rule in *Wakefield v. Duke of Buccleugh*.

197. Rule in *Hext v. Gill*.

198. Rule in *Smart v. Morton*.

199. Rule in *Hilton v. Lord Granville*.

200. Distinction between conveyance of quarries and mines.

201. Buildings not contributing to injury may be recovered for.

202. No prescriptive right for support of buildings can be acquired.

203. Rule as between railroad and canal companies and mine owners.

204. Rule in *Midland R. R. Co. v. Checkley*.

205. Relative rights and liabilities of parties.

206. Liability of surface owner to the mine owner.

207. Liability of mine owner to the owner of the surface.

208. Lands granted for sand or soil, does not authorize their removal to injury of grantor's land.

209. Withdrawal of soil at however great a distance, is actionable if injury results.

210. Rule in *Ludlow v. Hudson R. R. Co.*

211. Support for land and buildings by implied grant.

212. Right to mutual or lateral support cannot be acquired by prescription.

213. Rule of damages.

SEC. 173. There are no adjudged cases in which it is held that the owner of lands has an absolute right to the support of the adjoining lands for his land, on either side thereof, or to the support of the minerals or soil beneath the surface, where there are two freeholds in the same estate, one in the surface and the other in the minerals, unless such support is necessary to prevent injury to his land from falling away. Instead of an absolute right of support, the rule established by the cases seems to be, that every land owner has a right to have his land preserved *intact*, and that an adjoining owner excavating upon his own

land is subject to this restriction, that he must not excavate his soil so near to the land of his neighbor that his neighbor's soil will crumble away under its own weight and fall upon his land. But, if the nature of his neighbor's soil is such that, by the force of its own coherence, it will and does sustain its own weight and remain intact, an adjoining owner may excavate to the very extremity of his line, and no action lies therefor.¹ Therefore there cannot be said to be an absolute natural right of support; for if that were so, it would exist as against every species of soil, and the withdrawal of the neighboring soil, whether attended with damages or not, would be actionable as an injury to a right.

SEC. 174. The rule may then be stated thus: every land owner has a right to have his soil preserved intact, as against its own weight and the ordinary effects of the elements; and an adjoining owner who excavates so near to the line of his neighbor's land as to cause the same to crumble or fall away, is liable for all the damages ensuing therefrom; but if the character of the adjoining soil is such that it will and does sustain its own weight and the natural pressure thereon by the power of its own coherence, without the aid of the support of the surrounding soil, the adjoining owner may remove his soil without liability to damage. No damage is recoverable except for the actual disturbance of the integrity of the soil. There is no such thing recognized by the law as an *absolute right of support*. But there is a *qualified* right, and that is, that every man is entitled to have his soil left intact, and that no removal of the adjoining soil can be made so as to disturb the integrity of the soil of others. There are many cases in which there is much loose *dicta*, to the effect that every man has a right to have his soil supported by the adjacent soil,

¹ Wilde v. Minsterly, 15 Car., 1 B. R. Pasch. 384; Farrand v. Marshall, 19 Barb. (N. Y. Sup. Ct.) 380; Farrand v. Marshall, 21 id. 409; McGuire v. Grant, 1 Dutch. (25 N. J.) 356; Richardson v. Vt. C. R. R. Co., 25 Vt. 465; Thurston v. Hancock, 12 Mass. 220; Shrieve v. Stokes, 8 B. Monr. (Ky.) 453; Moody v. McClelland, 39 Ala. 45; Bonomi v. Backhouse, 27 L. J. (N. S.) 388; Humphries v. Brogden, 12 Q. B. 739; 1 E. L. & Eq. 241; Foley v. Wyeth,

2 Allen (Mass.), 121; Callendar v. Marsh, 1 Pick. (Mass.) 164; La Sala v. Holbrook, 4 Paige's Ch. (N. Y.) 169; Pantou v. Holland, 17 Johns. (N. Y.) 92; Napier v. Bulwinkle, 5 Rich. (S. C.) 511; Solomon v. Vinters Co., 4 H. & N. (Exch.) 585; Smith v. Thackerash, L. R. (1 C. B.) 564; Elliott v. N. E. R. R. Co., 10 H. L. 354; N. E. R. R. Co. v. Elliott, 1 Johns. & H. 146; Rawbotham v. Wilson, 8 E. & B. 123.

and that this right exists as "an incident to the land, as a right of property necessarily and naturally attached to the soil," but there is no case in which the actual judgment of the court is not in direct opposition to this dicta. The case of *Wilde v. Minsterly*, which is regarded as an authority for the doctrine of support, is a full authority for the opposite doctrine. In that case it is said, "If A, seized in fee of land next adjoining the land of B, erect a new house on his land, and part of the house is erected on the confines of his land next adjoining the land of B, if B afterward digs his land near the foundation of the house of A, whereby the foundation of the house and the house itself falls into the pit that B has dug, still no action lies at the suit of A against B, for this was the fault of A himself, that he built his house so near to the land of B; for he could not by his act hinder B from making the most profitable use he could of his land. 15 Car., 1 B. R., *Wilde v. Minsterly*. ROLLE, in stating this case, says: "But *semble*, that a man who has land next adjoining to my land, cannot dig his land so near to my land that thereby my land shall fall into his pit; and for this, if an action were brought, it would lie." Lord CAMPBELL, in *Wyatt v. Harrison*, 3 Barn. & Ad. 871, in referring to this dicta, treated it as an authority for the doctrine of support, and it has ever since been referred to as sustaining that doctrine. But it cannot even be tortured into any such signification. It simply asserts the doctrine that every person has a right to have his land left intact, and that an adjoining owner cannot excavate his own land when, by so doing, he interferes with the integrity of his neighbor's soil, by letting it into his pit. He does not say that A may not dig in his own land up to the line of his neighbor's land, if he can do so without letting down his neighbor's land, but that he cannot do so, *so as to let it down*, leaving the fair inference to be drawn that he may dig with impunity when the nature of the soil is such that it will stand intact by the force of its own coherence. But we only refer to this case and ROLLE's dicta because it is regarded as the basis of the law of support as a natural right. We do not need to go back to the reign of Charles I. to find that no such right exists, except as has been before stated.

SEC. 175. As illustrative of the utter baselessness of the right to the extent that is given it by the *dicta* of the courts, we will take the case of *Farrand v. Marshall*, 19 Barb. 380, and 21 id. 409. That was an action for an injunction seeking to restrain the defendant from removing the support from the plaintiff's land, by excavating upon his own land within a certain distance on either side thereof. A preliminary injunction was granted as prayed for in the complaint. The question was argued before HARRIS, J., at special term, and that learned judge in a very able opinion reported in the 19th of Barbour sustained the plaintiff's right to the support of the defendant's land, *but* modified the injunction so as to restrain the defendant from excavating upon his land so as to injure the land of the plaintiff. The learned judge said: "I think the injunction should be so modified, as only to restrain the defendant from excavating or removing any soil from any land adjoining the plaintiff's premises which shall cause the plaintiff's land, by reason of the withdrawal of the lateral support, to fall away or subside," and the injunction was thus modified, thereby leaving the defendant to excavate every inch of his own land, if he could do so without letting down the plaintiff's land or causing its subsidence. Recognizing clearly, not an absolute right on the part of the plaintiff to support for his land from the land of the defendant, but a qualified right of support, *if necessary*, for the protection of the integrity of his soil in its natural condition, and leaving the defendant at liberty to withdraw this support if he could do so and still leave the plaintiff's premises intact. Upon an appeal to the general term the judgment of the lower court was sustained. WRIGHT, J., among other things, saying: "The right to lateral support is regarded as an incident to the land; a right of property, necessarily and naturally attached to the soil. * * * * The defendant is engaged in converting the earth that is removed into brick. He may do this provided that he interferes not with the paramount right of others to the possession and enjoyment of their property, or the natural right which they possess to have their land surrounded and protected by the adjacent soil." But mark the inconsistency. He speaks of the right to have their lands surrounded and protected by the neighboring

soil, as a *paramount* right, but in the very next sentence he says: "He may thus use his own, but if the consequences are that he injures the plaintiff by such use," not by taking away the support from his soil, if it will stand by the power of its own coherence, but "*by causing the lands of the latter to subside and fall over on the defendants' land*, an action may be sustained *for the damage sustained by the subsidence.*" Still further on he says: "We entertain no doubt of the power to restrain the defendant from excavating or removing any soil adjoining the plaintiff's premises, which should cause the plaintiff's land, by reason of the withdrawal of its lateral support, to fall away or subside." Thus it will be seen, that while there is much said in this case about the *natural right* to have land surrounded and protected by neighboring soil, and about this right being a right of property necessarily and naturally attached to the soil, it is in *fact*, by the actual decision and judgment of the court, held, that no such right exists as a natural right, but only exists when the removal of the neighboring soil will disturb the integrity of the adjoining land, and let it in upon the land excavated.

SEC. 176. In *La Sala v. Holbrook*, 4 Paige's Ch. (N. Y.) 167, Chancellor WALWORTH says: "I have a natural right to the use of my land in the situation in which it was placed by nature, protected and surrounded by the soil of the adjacent lots. And the owners of those lots will not be permitted to destroy my land by removing this natural support or barrier. Thus it is laid down by ROLLE, that I may sustain an action against a man who digs a pit on his own land so near to my lot that my land falls into his pit." Thus the learned chancellor, in defining the right of support, and an actionable injury thereto, defines it as being such a protection for his soil as will preserve its integrity and prevent its falling into an adjoining excavation. An examination of all the cases upon this point will show this to be the extent of the right.¹ Cases of subjacent support are controlled by the same principles as those of lateral support, of which

¹ *Thurston v. Hancock*, 12 Mass. 220; *McGuire v. Grant*, 1 Dutch. (25 N. J.) 856; *Vermont Central Railroad Co. v. Richardson*, 25 Vt. 465; *Foley v. Wyeth*, 2 Allen (Mass.), 121; *Shrieve v. Stokes*, 8 B. Monr. (Ky.) 453; *Moody v. McClelland*, 39 Ala. 45.

Humphries v. Brogden, 12 Q. B. 739; 1 E. L. & Eq. 241, is regarded as the leading case, and it will be seen by an examination of the case that the court fully sustains the proposition, that the right of support is only to the extent necessary to prevent a fall of the land. That was an action on the case for injury to the plaintiff's lands by the removal of the minerals under its surface, so that the land subsided, cracked, and was materially injured. Lord CAMPBELL, C. J., in a very elaborate opinion, reviewed all the English cases bearing upon the question. He said: "Where there are separate freeholds, from the surface of the land and the minerals belonging to different owners, we are of the opinion that the owner of the surface, while unincumbered by buildings and in its natural state, is entitled to have it supported by the subjacent mineral strata. Those strata," he adds, "may of course be removed by the owner of them, so that a sufficient support for the surface is left; but if the surface subsides, and is injured by the removal of those strata, * * * an action may be maintained against the owner of the minerals for the damages sustained by the subsidence." Thus it will be seen that the degree of support, to which the owner of the surface is entitled, is such as will prevent the subsidence of his land, and although the court say that the owner of the surface "is entitled to the support of the mineral strata," that nevertheless this right is qualified by and confined to such a support as will preserve the integrity of the surface, and that if the nature of the surface is such that it will support itself independent of the minerals, the entire mineral strata may be removed and no action will lie therefor. Then in fact the surface owner is not *of right* entitled to the support of the mineral strata, or any part thereof, unless it is essential to prevent the subsidence of the upper soil, and the law only gives him a remedy, according to the doctrine of this case, where damages are sustained by reason of a subsidence of or actual injury to the land. The following cases will be found to establish the same position.¹

¹ *Wyatt v. Harrison*, 3 B. & Ad. 871; *Harris v. Ryding*, 5 Mees. & Wels. (Exch.) 181; *Rowbotham v. Wilson*, 6 E. & B. 593; *Caledonia Railroad Co. v. Spud*, 2 Macq. (Scotch) 449; *Wakefield v. Duke of Buccleuch*, 4 Law R. (Eq. Cas.) 613; *Hunt v. Peake*, Johns. Ch. (Eng.) 705; *Hamer v. Knowles*, 6 H. & N. 454; *Roberts v. Haines*, 6 E. & B. 643; *Backhouse v. Bonomi*, 9 H. L. C. 508; *Smart v. Morton*, 5 E. & B. 30; *Hilton v. Lord Granville*, 5 Q. B. 701; *Marquis of Salisbury v. Gladstone*, 9 H. L. C. 692; *Berkley v. Shafts*, 15 C. B. (N. S.) 79;

SEC. 177. The right to support only extends to the soil itself, and does not include any thing placed thereon that sensibly increases the pressure,¹ nor does it exist after the owner has removed the soil, and substituted a wall or other artificial substitute therefor.² This right to support from neighboring soil exists *ex jure naturæ*, and not as an easement,³ although it partakes of the nature of an easement, and is frequently classed as such both by elementary writers and courts.⁴ BRAMWELL, B., in *Rowbotham v. Wilson*, says: "I think it inaccurate to say that the plaintiff is claiming any kind of easement, qualified or otherwise; *an easement seeming to me to be something additional to the ordinary rights of property.*" But it will not be profitable for us to discuss this question here. The right exists, and, whether it is to be regarded as an easement or a natural right, is a question of small consequence.

SEC. 178. It must not be understood that the right to support ceases to exist when the land is incumbered with a building or other erection. It is true that the right extends only to the soil itself, but it is by no means restricted, as is stated by some of the elementary writers, to "the land in its natural state."⁵ It exists only as to the soil, but, however the soil may be incumbered with buildings or other structures, unless they contributed directly to the injury, a right of action exists for an interference with the right, precisely as much with as without the buildings.⁶ Indeed I think the cases will justify the broad statement, that in actions for injuries to the right of support, where liability is sought to be avoided, on the ground that there are erections on

Dugdale v. Robertson, 3 K. & J. 695; Proud v. Bates, 34 L. J. (Ch.) 406, and indeed all the English cases are to the same effect.

¹ Stansell v. Jollard, 1 Selw. N. P. 444; Wyatt v. Harrison, 3 B. & Ad. 871; Partridge v. Scott, 3 Mees. & Wels. 220; Humphries v. Brogden, 12 Q. B. 744; Solomon v. Vinters Co., 4 H. & N. (Exch.) 585; Murchie v. Black, 34 Law J. (C. P.) 337.

² Wilde v. Minsterly, ante; Thurston v. Hancock, 12 Mass. 220; La Sala v. Holbrook, 4 Paige's Ch. (N. Y.) 167; Richardson v. Vermont Central Rail-

road Co., 25 Vt. 465, opinion of BENNETT, J.; Hay v. Cohoes Co., 2 N. Y. 159.

³ Rowbotham v. Wilson, 8 E. & B. 136; Bonomi v. Backhouse, E. L. & Eq. 622; Thurston v. Hancock, ante.

⁴ Gale on Easements, 148.

⁵ Washburn on Easements, 431; Gale on Easements 311.

⁶ Foley v. Wyeth, 2 Allen (Mass.), 131; Hunt v. Peake, Johns. Ch. (Eng.) 705; Thurston v. Hancock, 12 Mass. 220; Brown v. Robbins, 4 H. & N. (Exch.) 186.

the plaintiff's land that contributed to the injury, that it is incumbent upon the defendant to make out his defense by clearly establishing the fact, that the injury would not have resulted except for the erections. In other words, that the pressure of the buildings was the principal cause of the injury to the soil. Nor does it seem to be settled, particularly in the courts of this country, that no recovery can be had where the buildings have in a measure contributed to the injury, where they are not the principal cause; and in *Foley v. Wyeth*, a different doctrine was strongly hinted at by MERRICK, J., in delivering the judgment of the court. He says: "Whether if the pressure of the weight of artificial structures which the owner has placed upon his own land for a lawful purpose, and in its reasonable use contributes to cause a slide or crumbling away of his soil into a pit excavated in an adjoining close by another proprietor, this will deprive him of the right to remuneration for the injury sustained, may be considered at least open to denial."

SEC. 179. In *Brown v. Robbins*, referred to in the previous note, the action was for injury to the plaintiff's lands and buildings by reason of excavations beneath the premises, causing a subsidence of the soil, and a consequent injury to the buildings. A question was raised by the defendant, that he was not liable if the house contributed to the injury; and the judge, among other things, submitted the question to the jury, "whether the land fell from the superincumbent weight of the house, or whether it would have fallen in the same manner whether there had been a house upon it or not." The jury found that the weight of the house did not contribute to the injury, and returned a verdict of £300 for the plaintiff. Upon a rule to show cause, etc., in the court of exchequer, POLLOCK, C. B., said: "As to the right of support for the house, *quid* house, if necessary to decide it, which it is not, I should be disposed to hold that the plaintiff was entitled to the support of the surrounding ground. But the moment the jury found that the subsidence of the land was not caused by the weight of the superincumbent buildings, the existence of the house became unimportant in considering the question of the defendant's liability. It is as if a mere model stood

there, the weight of which bore so small a proportion to that of the soil as practically to add nothing to it." MARTIN, B., said: "There is no ground for reducing the verdict. The house was lawfully on the plaintiff's land, and was injured by the unlawful act of the defendants." WATSON, B., said: "When a great weight is put on the land, which immediately causes a pressure upon the adjoining lands, a nice question sometimes arises; but here every thing was determined by the finding of the jury, that the accident was not caused by the weight of the house, and that this weight has no effect in causing a subsidence of the soil."

SEC. 180. This case establishes the principle fully, that the mere pressure upon land of a superincumbent weight, as buildings, or any thing else, does not prevent a recovery for an interference with the right of support, where the superincumbent weight does not contribute to the injury; and that in such a case a recovery may not only be had for the actual injury to the soil, but also for all injuries to the buildings thereon standing. And when it is remembered that this was a case of injury to *subjacent* support, and mainly for injuries to the buildings, and the main question raised upon exceptions and urged before the court was whether the verdict was not against the evidence, I think the case must be regarded as further establishing the doctrine that the pressure of a superincumbent weight upon the soil, in the form of buildings or other lawful erections, will not defeat a recovery for injuries to support, unless they are the cause of the injury itself; and that the mere fact that they have in a measure contributed thereto, when not the principal cause, does not operate as a defense. It is true that the verdict established that the buildings did not contribute to the injury, but the verdict was clearly wrong; for no person could doubt that every pound of additional weight imposed upon the surface of the soil increased the vertical and lateral pressure, and that the weight of several thousand pounds, such as would be likely to be imposed even by the most ordinary buildings, would in a measure contribute to the subsidence of the soil beneath them, and that a much slighter removal of the soil would be followed by a subsidence thereof, with the buildings upon the surface,

than without them; yet the verdict was sustained, and the court even intimate that without such a finding of the jury, liability would exist. Indeed, upon the argument, POLLOCK, C. B., put this pertinent inquiry to the counsel: "Has a person a right to dig so near to the land of his neighbor *as to disturb his soil* whether there is a house there or not?"

SEC. 181. A distinction exists between an injury to the soil and an injury to the wall or other structure erected in lieu of it. In the case of a building erected upon the surface of the soil where no excavation has been made for a foundation, a removal of the support of the adjoining soil would be actionable, notwithstanding the presence of the building, if any injury to the soil thus left unsupported followed, even though the excavation was made in the exercise of the highest care and skill possible. In such cases where no excavation has been made and no artificial support has been substituted for the soil, the adjoining owner excavates so near to his neighbor's line as to disturb his soil at his peril. It is an interference with a natural right, and a nuisance, and liability attaches whether the digging was accompanied with negligence or not.¹ If by the increased weight imposed upon the soil by the building the damage is enhanced, this does not defeat liability for such damages as would have arisen if no building had been placed there, but only such as are the direct results of the pressure of the building.² This precise question has not been directly decided, and the later authorities disclose a tendency of the courts in that direction.³

SEC. 182. In *Hamer v. Knowles*, 6 H. & N. (Ex.) 459, the action was brought by a tenant of certain mills for damages sustained by a subsidence of the soil and mills by reason of the

¹ *Thurston v. Hancock*, 12 Mass. 220; *Hay v. Cohoes Co.*, 2 N. Y. 159; *Treman v. Cohoes Co.*, id. 164; *Stroyman v. Knowles*, 6 H. & N. (Exch.) 454; *Hamer v. Knowles*, id. 459.

² *Richardson v. Vermont Central Railroad Co.*, 25 Vt. 465. In this case BENNETT, J., says: "If there is any error in the decision of the case in the 12th Mass. (*Thurston v. Hancock*)

it is, I apprehend, to be found in the courts not discriminating between the soil that fell into the excavation from its own inherent weight, and that which was *pressed* in by the building." *Foley v. Wyeth*, 2 Allen (Mass.), 181; *Brown v. Windsor*, 1 C. J. Am. Notes, 2 Dane's Ab. 717; *Farrand v. Marshall*, 19 Barb. (N. Y. Sup. Ct.) 380.

removal of minerals beneath the adjoining lot. The action was referred, and the referee found that the subsidence of the ground resulted from the mining operations, and assessed the damages at £1,590, as follows: £90 for the damage to his business, and £1,500 for deterioration of the value of the buildings and premises. Upon hearing the cause in the court of exchequer the defendant's counsel insisted that there could be no recovery for injury to the buildings, because no right of support existed for them; but POLLOCK, C. B., said: "It is said that the plaintiff had no right of support for buildings; but methink that if their being there did not contribute to the subsidence, the plaintiff is entitled to damages for injury to them through the defendant's wrongful act in causing the land to subside—the ground on which they stood."¹

SEC. 183. In this case, as the case shows, the principal damage arose, not from the removal of the minerals beneath the mill, but beneath the adjoining lot, at some distance from the plaintiff's premises, and the subsidence of the soil was gradual, and covered a considerable period*after the acts from which the damage arose had been done, during all of which time the mills were in operation, and from the circumstance that the arbitrator only found the injury to the plaintiff's business to be £90, it is evident that no great hindrance in that respect was shown. The principal injury was to the buildings by reason of the subsidence of the soil, which the arbitrator says "continued from time to time in consequence of the previous mining operations." It is true that the arbitrator found that the weight of the buildings did not contribute to the injury, but it is quite difficult to understand how such a finding could be sustained when the subsidence was gradual, and the weight of the buildings and machinery of such extensive works must have been enormous, and where the motion and constant jarring of the machinery of extensive works must in a measure have contributed to the damage. But irrespective of this question this case is a full authority in support of the doctrine that, where there is a wrongful withdrawal of the support of the soil, even in an adjacent lot at a great dis-

¹ *Brown v. Robbins*, 4 H. & N. 186.

tance from the point of injury, a recovery may be had for injuries to the buildings and other structures upon the surface of the soil, where they do not contribute to the injury ; and it would seem from the facts in the case, that it fairly warranted the doctrine that there may be a recovery for injuries to all structures upon the soil, when they are not the promoting, or principal cause of the injury. That, whenever injury would have resulted if no buildings existed, a recovery may be had, even though they in a measure contributed thereto and hastened it. If not in theory, that is certainly the *practical* effect of all the cases, and sustains the doctrine hinted at by MERRICK, J., in *Foley v. Wyeth*. It is an easy matter for courts to say, as in *Hunt v. Peake*, that the weight of a building would make no perceptible increase in the pressure of the soil, and for jurors and arbitrators to find in cases for damages in consequence of the subsidence of the soil covered by buildings whose weight is many thousand pounds, and where the subsidence is gradual and covers a long period after the support is withdrawn, that the weight of the buildings has not contributed to the injury ; but common sense teaches every person that such findings are erroneous, false even, and only used as a cover for verdicts or judgments that accord with the sympathies of the triers, and their notions of the actual equities of each case, and that the only remedy for such evils is the establishment of the broad doctrine, which is sustained both in reason and equity ; that a recovery may be had in all such cases, where the superincumbent weight is not the principal cause of, even though it has in a measure contributed to, the injury, where the owner has not removed his own soil so as to deprive him of this natural right.

SEC. 184. In *Farrand v. Marshall*, 19 Barb. (N. Y. Sup. Ct.) 380, which is a well-considered case and entitled to weight as an authority, HARRIS, J., in the course of his analysis of the case of *Thurston v. Hancock*, 12 Mass. 220, thus gives expression to his views upon the law as applicable to the facts of that case ; and while this expression is in no measure an authority, yet as the expression of an able and eminent jurist, it shows the strong tendency of courts toward a more consistent and equitable con-

struction of the legal relations of adjoining land owners, than is to be found in the *dicta* of ROLLE: "A man who, himself, builds a house adjoining his neighbor's land (says PARKER, C. J., in *Thurston v. Hancock*), ought to foresee the probable use by his neighbor of the adjoining land, and by a convention, or by a different arrangement of his house, secure himself against future interruption and inconvenience." Referring to the doctrine of ROLLE, he says: "We have not been able to discover that the doctrine has ever been overruled, nor to discover any good reason why it should be." The case itself was probably decided erroneously. Under the circumstances, as they appeared in evidence, I do not think the plaintiff was chargeable with any fault or negligence. He had taken the precaution to sink the foundation of his house *fifteen* feet below the natural surface. The defendant had dug and removed the soil upon his adjoining lot to the depth of forty-five feet. The result was that the plaintiff was obliged to take down his house to save the materials. No fault or negligence was imputable to the plaintiff; every reasonable precaution had been observed. On the contrary, the defendant was not using his land for any ordinary purpose. The plaintiff had sufficiently guarded himself against any ordinary use of the adjacent land, and it seems to me *that the action ought to have been sustained*." By the Roman law, no proprietor was permitted to excavate on his own land so as to endanger his neighbor's building, and every person erecting a new building was bound to place the new structure a certain distance from his neighbor's boundary. This rule, however, in its full extent, would hardly be adapted to the present condition of things, particularly in large cities and towns, where every inch of space is made available, and is indeed necessary to supply the demands of business. In *Hunt v. Peake, supra*, the court, in commenting upon the idea that no recovery could be had for an injury to support, where the land was incumbered with buildings, thus ridicules the doctrine and exposes its folly. WOOD, C. J., says: "In fact, the weight of such houses would bear about the same proportion to that of two hundred feet of soil which a chimney-pot bears to a house; and it would really be absurd to suppose

that the extra load of the house was the thing which caused the ground to yield for want of support."

SEC. 185. In a case in Kentucky,¹ it was held that a division fence between two adjoining land owners was not to be treated as an increased burden to the land, and that it was entitled to support as much as the land. This decision was placed upon the ground that a fence between adjoining lots is a necessary incident to the exclusive enjoyment of each owner of his own lot, and that it could not be regarded as a sensible increase of the burden to be supported. But suppose the fence to be a heavy stone wall, who can doubt that it would add essentially to the pressure upon the soil? The same principle that permits a division fence upon land would extend to buildings and all other structures that are essential to the actual enjoyment of the land.

SEC. 186. In *Wyatt v. Harrison*, 3 B. & Ad. 871, it appeared that the plaintiff and defendant were the owners of adjoining lots, upon both of which houses had been erected. The defendant rebuilt his house, and in so doing sunk the foundation thereof; and as a result the plaintiff's foundation wall was cracked and injured. It does not appear that the plaintiff's soil was interfered with, nor does the declaration in the case allege that as a cause of action or ground for damages. But it was for the injury to the wall and building by withdrawing the support of the defendant's soil. Lord TENTERDEN, C. J., said: "It may be true that if my land adjoins that of another, and I have not, by building, *increased the weight upon my soil*, and my neighbor digs in his land so as to occasion mine to fall in, he may be liable to an action. But if I have laid an additional weight upon my land, it does not follow that he is to be deprived of the right of digging his own ground, because mine will then become incapable of supporting the artificial weight which I have laid upon it." In this case it will be observed that the question of liability where a superincumbent weight has been added to the surface, is regarded as depending upon the

¹ O'Niel v. Haskins, 4 Bush. (Ky.) 653.

fact whether the building increased the weight upon the soil, and consequently contributed to the injury.

SEC. 187. As has been before observed, this right of lateral support only extends to the soil itself, hence if one owner sees fit to excavate up to the limits of his line, and replace the soil with a wall or other artificial structure, the right ceases to exist as to the wall or structure placed thereon, and the adjoining owner may, in the exercise of ordinary care, excavate to any depth upon his own land, even though by so doing he withdraws the support from such wall or structure, and causes it to fall into his pit.¹ For, in the language of Lord TENTERDEN in *Wyatt v. Harrison*, "I cannot, by laying an additional weight upon my land, deprive my neighbor of digging in his soil." The reason for this rule is, that if one land owner sees fit to erect a house at the confines of his own land, it is his own folly, and he cannot, by being prior in point of time, prevent his neighbor from building there also, and the only restriction imposed upon the adjacent owner is, that he must not negligently and carelessly excavate upon his own land; but, if he proceeds with ordinary care, he will be excused from liability, no matter how great the damage of his neighbor's buildings.²

SEC. 188. In *Panton v. Holland*, *ante*, the question of negligence was considered. In that case, it appeared that the plaintiff was the owner of a house and lot on Warren street, in the city of New York, and the defendant, in erecting a house on a lot contiguous to the plaintiff's, in order to lay the foundation, dug some distance below the foundation of the plaintiff's house, in consequence of which one of the corners of the plaintiff's house settled, the walls cracked, and the house in other respects was injured.

¹ *Thurston v. Hancock*, 12 Mass. 220; *La Sala v. Holbrook*, 4 Paige's Ch. (N. Y.) 169; *Farrand v. Marshall*, 19 Barb. (N. Y. Sup. Ct.) 409; *Shrieve v. Stokes*, 9 B. Monr. (Ky.) 453; *McGuire v. McGuire*, 1 Dutch. (N. J.) 356.

² *Thurston v. Hancock*, *supra*; *Panton v. Holland*, 17 Johns. (N. Y.) 92; *Trower v. Chadwick*, 6 Bing. (N. C.) 1; *Rockwood v. Wilson*, 11 Cush. (Mass.) 221. In *Pickard v. Collins*, 23 Barb.

(N. Y. Sup. Ct.) 444, the court say, that the *motives* with which one does a lawful act is of no consequence in determining the question of liability. *Smith v. Kenrick*, 7 C. B. 515; *Gayford v. Nichols*, 9 Exch. 702; *Walters v. Pfiel*, *Moody & M.* 362; *Dodd v. Holme*, 1 Ad. & El. 493; *Massey v. Gadyer*, 4 C. & P. 161; *Charles v. Rankin*, 22 Mo

556.

The plaintiff introduced evidence to show a want of proper skill and care in the persons employed by the defendant to lay his foundation. WOODWORTH, J., said: "I am of opinion that no man is answerable in damages for the *reasonable* exercise of a right, when it is accompanied by a cautious regard for the rights of others, when there is no just ground for the charge of negligence and unskillfulness, and when the act is not done maliciously." A verdict having been rendered for the plaintiff upon a charge of the court that withdrew the question of negligence from the jury, a new trial was granted, the judge saying: "The result of my opinion is, that the plaintiff has not shown a right to recover in this case, unless it be on the ground of negligence, in not taking all reasonable care to prevent the injury."

SEC. 189. In *Thurston v. Hancock*, 12 Mass. 220, the plaintiff was the owner of a lot on Beacon street, in the city of Boston, adjoining lands of the defendant, and erected a costly dwelling-house upon the confines of his lot, laying the foundation very deep. The defendant, a short time after the plaintiff's house was completed, commenced excavating upon his lot, and excavated to the depth of several feet below the lower line of the foundation of the defendant's house, and sold the earth so taken out. As a consequence, the plaintiff's house being deprived of the support of the defendant's land, began to settle, and he was obliged to take it down. The court held, that, in the absence of negligence or malice, no recovery could be had for the injury to the building.

SEC. 190. In *La Sala v. Holbrook*, 4 Paige's Ch. (N. Y.) 169, the plaintiffs were the owners of certain lots on Ann street, in the city of New York, upon which was a church called Christ's Church, which had been erected some thirty-eight years. The defendant was the owner of an adjoining lot on the west side of the church, and extending to within some six feet of the church. The defendant began the erection of a building upon his lot, covering the entire space, and was excavating for the foundation of the building, intending to sink it some sixteen feet lower than the foundation of the church. The plaintiffs brought their bill

for an injunction. A temporary injunction was granted upon the filing of the bill, but the defendant having answered and set up in his answer that he was proceeding with the work in a careful and skillful manner, and that his purpose in making the excavation to the depth named in the bill was to erect thereon a substantial building, upon hearing on appeal the injunction was dissolved, the court holding that the defendant was in the exercise of a legal right, and that the damage, if any, to the plaintiff would be "*damnum absque injuria*."

SEC. 191. The degree of care required on the part of a person excavating upon his own premises, near the foundation of another's building, cannot be accurately defined, but must necessarily depend upon the circumstances of each case. The character of the soil, the condition of the wall and building, the depth of the excavation, and all those conditions that a man of ordinary prudence would observe.¹ The better criterion by which to determine the question of liability would seem to be, that if the mere exercise of a lawful right to remove the soil upon his own premises occasioned the fall of the structure, no liability exists; but if the fall is occasioned by the manner in which it is removed, then liability attaches for all the consequences of the act.²

SEC. 192. As to the degree of care required of a person excavating upon his own land, where there is an erection upon the adjoining land, it seems that no more than ordinary care is required. There must be an absence of negligence or unskillfulness and of improper motive.³ There can be no negligence imputed, except as to structures, that are visible or known to the party causing the excavation to be made, and the degree of care to be used, is in view of the circumstances known to him.⁴ The

¹ *Panton v. Holland*, 17 Johns. 92; *McGuire v. Grant*, 1 Dutch. (N. J.) 356; *Rockwood v. Wilson*, 11 Cush. (Mass.) 221; *Charles v. Rankin*, 21 Mo. 566; *Foley v. Wyeth*, 2 Allen (Mass.), 131; *Shrieve v. Stokes*, 8 B. Monr. (Ky.) 453; *Massey v. Gadyer*, 4 C. & P. 161; *Smith v. Kendrick*, 7 C. B. 575.

² *Dodd v. Holme*, 1 Ad. & El. 493; *Trower v. Chadwick*, 3 Bing. (N. C.) 334;

Smith v. Kendrick, 7 C. B. 515; *Thurston v. Hancock*, 12 Mass. 220; *La Sala v. Holbrook*, 4 Paige's Ch. (N. Y.) 169; *Gale on Easements* (3d Lond. ed.), 349; *Walters v. Pfiel*, *Moody & M.* 364.

³ *McGuire v. Grant*, 1 Dutch. (N. J.) 361.

⁴ *Chadwick v. Trower*, 3 Bing. (N. C.) 334.

test is not whether a party has used such care as a prudent man would use if all the loss and damage was his own, neither is that degree of care required which a prudent man, skilled in such business, would use, nor, on the other hand, can he excuse himself from liability upon the ground that he has followed the directions of a skillful and careful person; but the decisive question is, was there negligence in view of the circumstances of the case?¹ Was the work managed and executed with such care and caution as men of common prudence usually exercise in the management of their own business?²

SEC. 193. The question sometimes arises as to what acts of the plaintiff, contributing to the injury, relieves the defendant from liability. In *Partridge v. Scott*, 3 M. & W. 220, it was held that, where the plaintiff had excavated under his own land, making it require more support than it otherwise would, he cannot recover of an adjoining owner who removes the minerals from his lands, if the injury would not have happened except for the excavation made by the plaintiff in his lands. In *Farrand v. Marshall*, 21 Barb. (N. Y. Sup. Ct.) 409, the rule was laid down that there can be a recovery for all such injuries, "provided the plaintiff has done nothing with his own land contributing to produce the injury, and in hostility to the legitimate and proper exercise of the other's paramount right to improve his own premises." The rule may be stated broadly, that if the damages would have resulted if there had been no contributory act on the part of the plaintiff, there can be a recovery;³ and the fact that the act of a third person has contributed to the injury, is no defense.⁴ Neither does the fact that a house is of faulty construction or out of repair shield the defendant from liability,

¹ *Charles v. Rankin*, 22 Mo. 556.

² *Rockwood v. Wilson*, 11 Cush. (Mass.) 221.

³ *Smith v. Hardesty*, 31 Miss. 411; *Walters v. Pfiel*, Moody & M. 362; *Richart v. Scott*, 7 Watts (Penn.), 460; *Dodd v. Holme*, 1 Ad. & El. 493; *Hamer v. Knowles*, 4 H. & N. 459.

⁴ *Foley v. Wyeth*, 2 Allen (Mass.), 121, in which it was held, that where buildings erected upon adjoining prem-

ises increased the pressure and promoted the injury, that furnished no defense in an action for damages resulting from the defendant's excavating his lands. The court said: "The defendant cannot exonerate himself by showing that the particular injury complained of would not have occurred if other persons had never made alterations or improvements upon their respective closes."

if the injury results from the defendant's negligence.¹ Where the defendant causes the injury in the prosecution of an improvement upon his own land, for his own benefit, according to his best skill and judgment, not foreseeing that it will produce injury to his neighbor, yet, if damages actually result to his neighbor therefrom, the fact that they were unwittingly inflicted will afford no protection from the consequences.²

SUBJACENT SUPPORT.

SEC. 194. There are frequently two freeholds in the same estate, one in the surface, and another in the minerals beneath; and the rights of parties thus situated, in reference to their several estates, often becomes an important subject of inquiry, particularly in mining districts. These estates are created by the owner of the entire freehold selling the estate, reserving the minerals beneath, or selling the minerals, reserving the surface. Of course the natural rights of the parties to such estate may be varied or changed by the conditions of the conveyances, and such rights reserved to one or given to another, in reference to the uses of the several estates, as the grantors thereof elect.³ The right to the minerals reserved is a right to land, but a right to work mines in another man's lands is an easement.⁴ But when there is a simple conveyance of the surface, reserving the mines, with the right to enter upon the surface to work the same, and no express power given or reserved to produce a subsidence of the surface, if necessary in the working of the mines,

¹ *Richart v. Scott*, 7 Watts (Penn.), 460; *Dodd v. Holmes*, 3 Ad. & El. 493; *Walters v. Pfiel*, M. & M. 362; *Smith v. Hardesty*, 31 Miss. 411.

² *Sutton v. Clark*, 6 Taunt. 29; *Tramer v. Chadwick*, 6 Bing. (N. C.) 1, is sometimes cited as establishing a different doctrine, but an examination of that case will show that the judgment turned upon the question of negligence, the court holding that, where there was no reason to apprehend damage, a less degree of care would be required than where the injurious results were obvious. In *Shrieve v. Stokes*, 8 B. Monr. 433, there is a *dictum* to the effect that one excavating in his own lands would not be

liable for damages that resulted when he had no just cause to apprehend them, and they resulted from an unforeseen cause. *WASHBURN*, in his valuable work on Easements, p. 439, lays down the same doctrine, citing the two last-named cases as authority therefor; but I apprehend that the cases do not really sustain the doctrine, and that the rule as laid down by *GIBBS, C. J.*, in *Sutton v. Clark*, really embodies the true rule of liability.

³ *Hartwell v. Camman*, 2 Stockt. (N. J.) 128; *Stewart v. Chadwick*, 8 Clarke (Iowa), 463; *Caldwell v. Copeland*, 87 Penn. St. 427; *Merritt v. Judd*, 14 Cal. 49.

⁴ *Wilkinson v. Proud*, 11 M. & W. 33.

the person owning the minerals is bound at his peril not to cause a subsidence of the surface, even though he cannot work his mines at all without doing so; and no degree of care or skill exercised in the mining operations will shield him from liability to the owner of the surface for all damages sustained by reason of any subsidence thereof.¹ A custom, as between the owner of the surface and the owner of the mines, entitling the owner of the mines to cause a subsidence of the surface, if necessary to the working of the mines, will not be operative to shield the mine owner from liability — and such a custom has been held bad and wholly void.² There are some English cases³ in which such a custom was measurably sustained, but they seem to have been overruled by the later cases; and it seems to be well settled that, in the absence of express contract, the owner of the minerals cannot remove them without leaving sufficient support to maintain the surface in its natural condition, and that if the mine owner so weakens the support of the surface, by the removal of the minerals, as to cause its subsidence, he is liable for all the damages that ensue therefrom. He may take out so much of the minerals as he can without causing a subsidence of the surface, but is bound at his peril not to go beyond that point.⁴

SEC. 195. In *Harris v. Ryding*, 5 Mees. & Wels. (Exch.) 60, a question came before the court as to the rights of a mine owner and the owner of the surface under a conveyance from the defendant, in which he reserved "all and all manner of coals, seams and veins of coal, iron ore, and all other mines, minerals and metals which then were, or at any time, and from time to time there-

¹ Wakefield v. Duke of Buccleugh, 4 L. R. (Eq. Ca.) 613; Humphries v. Brogden, 15 Jur. 124; 1 E. L. & Eq. 241; 20 L. J. (N. S.) Q. B. 10.

² Hilton v. Lord Granville, 5 Q. B. 701; Blackett v. Bradley, 1 Best & Smith, 940; Wakefield v. Duke of Buccleugh, 4 L. R. (Eq. Ca.) 651; Constable v. Nicholson, 14 C. B. (N. S.) 230.

³ Bateson v. Green, 5 T. R. 411; Artlett v. Ellis, 7 B. & C. 346; Folkard v. Hammett, 5 T. R. 517.

⁴ Humphries v. Brogden, 15 Jur. 124; 20 L. J. (N. S.) 10; 1 Eng. Law & Eq. 241; 12 Q. B. 739; Harris v. Ryding, 5

M. & W. 60; Smart v. Morton, 5 E. & B. 30; Peyton v. Mayor of London, 9 B. & C. 725; 7 L. R. (K. B.) 322; Partridge v. Scott, 3 M. & W. (Exch.) 220; 7 L. J. (N. S.) 101; Rowbotham v. Wilson, 8 H. L. Cas. 348; Hamer v. Knowles, 6 H. & N. 458; Bonomi v. Backhouse, E. B. & E. 622; Jeffries v. Williams, 1 Eng. Law & Eq. 436; 5 Exch. 792; Proud v. Bates, 34 L. J. (Ch.) 406; Dugdale v. Robertson, 3 K. & J. 695; Berkly v. Shafte, 15 C. B. (N. S.) 79; Richards v. Harper, L. R. (Ex.) 199; Elliott v. N. E. R. R. Co., 10 H. L. Cas. 333.

after, should be discovered in or upon said premises, with free liberty of ingress, egress or regress, to come into or upon the premises to dig, delve, search for and get to the said mines and every part thereof, and to sell and dispose of, take and convey away the same at their free will and pleasure; and also to sink shafts for the raising up works, carrying away and disposing of the same or any part thereof, making a fair compensation to the owners of the surface for the damage done thereto, and the pasture and crops growing thereon." Under this reservation the defendant began the work of taking out the minerals, and, failing to leave suitable supports, the surface subsided and injured the plaintiff's estate. The plaintiff brought his action on the case for the nuisance, and the defendant plead in bar to a recovery the powers reserved to himself in his grant to the plaintiff. The jury returned a verdict for the plaintiff, and, upon hearing in Exchequer, PARKE, B., in delivering an opinion as to the rights of the parties under this reservation, said: "The rule of law is, that a reservation is to be construed strictly; still, however, it would reserve to the grantor all that was not conveyed by the grant, provided the meaning and intention of the parties be clear; what then is the meaning and intention of the parties here? It is clearly the meaning and intention of the grantor, that the surface shall be fully and beneficially held by the grantee, he reserving to himself all the mines and veins of coal and iron ore below. By reasonable intendment, therefore, the grantor can be entitled under the reservation only to so much of the mines below as is consistent with the enjoyment of the surface, according to the true intent of the parties to the deed, that is, he only reserves to himself so much of the mines and minerals as could be got, leaving a reasonable support to the surface." The verdict was sustained by the unanimous opinion of the court. Thus it will be seen, that if the owner of the fee would reserve the minerals and the right to take them out, even to the extent of causing a subsidence of the surface, he must reserve that power in his grant in express and positive terms.

SEC. 196. In *Wakefield v. The Duke of Buccleugh*, 4 L. R. (Eq. Cas.) 624, there was a sale of the surface to the plaintiff, the defendant reserving all mines, with the right to use the surface

for the purpose of working the mines. The defendant, in the process of working the mines, weakened the support of the surface from the mineral strata, and the plaintiff brought a bill to restrain the defendant from working the mines at all, alleging that the same could not be worked without injury to the surface. It having appeared, upon hearing of the cause, that the mines could not be worked at all without injury to the surface, the defendant insisted that he, being the owner of the minerals, had a right to take them out, observing the custom of the country, and leaving such supports for the surface as it was the custom to leave. And that the fact that the quarries were on the surface, in view of the right reserved by him to take out the minerals, showed that, if thought necessary, he might disturb the surface. But Vice-Chancellor MALINS, after an able and exhaustive review of all the cases bearing upon the point, granted an injunction restraining the defendant from working the mines so as to cause a subsidence of the surface, in the absence of an express reservation of power to do so. And, in commenting upon the point that the defendant could not work his mines at all without injury to the surface, he said: "I am fully alive to the fact that the result of my judgment is to put the owner of the mines at the mercy of the owner of the surface, but in most instances their common interest would lead to an arrangement, and I assume the contrary to be the case here only on account of the surface being of some extraordinary value to the plaintiff." Thus establishing fully the doctrine that the owner of the minerals cannot take them under a reservation, or by virtue of any custom, unless he has expressly reserved to himself the right to produce a subsidence of the surface, if necessary. The judgment in this case was afterward reversed in the house of lords,¹ but the same doctrine was held there as in the court below, as to the necessity of an *express reservation*; but the court held that the language of the reservation in this case conferred the power upon the defendant absolutely to destroy the surface.

SEC. 197. In *Hext v. Gill*,² there was a conveyance to the plaintiff of the premises, with a reservation to the defend-

¹ *Wakefield v. Duke of Buccleugh*, ² *Hext v. Gill*, 7 L. R. (Eq. Cas.) 699. L. R., 4 H. L. 377.

ants of all the mines and minerals therein, and a right of entry to work the mines. There was a large quantity of china clay upon the premises, which the defendant claimed the right to take out of the land under his reservation of minerals, but which could not be taken out without injury to the surface. The court held that the clay was embraced in the reservation, but that the defendant having neglected to reserve the right of interfering with the surface by the operations of mining, the power could not be implied from the mere fact that a reservation had been made. That the reservation of minerals, with the right to work the mines, could only be construed as giving a right to take out the minerals, if that could be done without causing a subsidence of the surface, and restrained the defendant from taking out the clay in any manner that would injure the surface.

SEC. 198. In *Smart v. Morton*,¹ there was a reservation of the minerals in the land, with power "to seek, work and win the same in any part of the said premises, and to drive drift or drifts, make water-gate or water-gates, or use any other way or ways for the better and more commodious working and winning the same, in the said hereby granted or intended granted premises, or any part of the same." A verdict having been rendered in favor of the plaintiffs, upon hearing in exchequer, Lord CAMPBELL, C. J., said: "The simple reservation of the minerals does not deprive the grantee of the surface of the right of support from the minerals, and the defendant must rely upon the supposed power reserved for the working of the minerals." The judgment of the lower court was affirmed. So in *Bell v. Wilson*,² the minerals were reserved, and it was held that certain stones in the soil were embraced under the reservation; but, although power to work and take out the minerals was reserved in the grant of the surface, yet the lord justices held that, as the stone could not be taken out except by quarrying, and a consequent destruction of the surface, the defendant, under a reservation of power to take out the minerals, without an express reservation of a right to let down or destroy the surface, would not be justified in injuring the surface.

¹ *Smart v. Morton*, 6 E. & B. 643; 30 Eng. Law & Eq. 385.

² *Bell v. Wilson*, 4 L. R. (Eq. Ca.) 303.

SEC. 199. In *Hilton v. Lord Granville*,¹ it was held that where lands had been improved and were covered with buildings, even a grant to let down the surface would be regarded as repugnant, and rejected as absurd. And that decision was afterward supported in the house of lords, in the case of *Marquis of Salisbury v. Gladstone*.² In *Richards v. Harper*,³ there was a grant with covenants against liability for the subsidence of the surface in the working of the mines; but the court held that this covenant did not run with the land. In several other cases,⁴ it was held that stipulations as to the manner of working the mines, and for compensation for all injuries to the surface resulting therefrom, did not deprive the surface owner of his right to support from the mineral strata, or justify the owner of the mines in depriving him of it. To summarize these doctrines, as held by the courts, it may be said that the surface has a right to support; that this is a part of the freehold, and not an easement;⁵ that the mine owner can only work so far as is consistent with this right, and is liable if he violates it;⁶ and that the right of support is independent of the nature of the strata, and in no sense dependent upon the fact that it cannot be worked without injury to the surface. This is the mine owner's misfortune, and does not in any sense impair the surface owner's right.⁷ The highest care and skill in the working of the mine is no defense whatever, if injury results to the surface; and negligence need not be proved, even though it is alleged in the declaration.⁸ The degree of support must be in accordance with the present or intended use of the property,⁹ and a custom of the country will not uphold an injury thereto.¹⁰ But the right *may* be waived by grant, or by *express* reservation of the right to interfere with it; but the lan-

¹ *Hilton v. Lord Granville*, 5 Q. B. 721.

² *Marquis of Salisbury v. Gladstone*, H. L. C. 692.

³ *Richards v. Harper*, 1 L. R. (Exchq.) 199.

⁴ *Humphries v. Brogden*, 1 Eng. Law & Eq. 380; *Harris v. Ryding*, 5 M. & W. 60; *Roberts v. Haines*, 7 E. & B. 625; also 6 id. 643.

⁵ *Backhouse v. Bonomi*, 9 H. L. C. 503.

⁶ *Caledonian R. R. Co. v. Sprot*, 2 Macq. (Scotch) 449.

⁷ *Wakefield v. Duke of Buccleugh*, 4 H. L. C. 377.

⁸ *Hamer v. Knowles*, 6 H. & N. 459; *Smart v. Morton*, 30 Eng. Law & Eq. 385; *Hunt v. Peake*, Johns. Ch. (Eng.) 705; *Brown v. Robbins*, 4 H. & N. 186.

⁹ *Proud v. Bates*, 34 L. J. (Ch.) 406; *Berkly v. Shafte*, 15 C. B. (N. S.) 79; *Dugdale v. Robertson*, 3 K. & J. 695.

¹⁰ *Constable v. Nicholson*, 14 C. B. (N. S.) 230; *Wakefield v. Duke of Buccleugh*, 4 L. R. (Eq. Cas.) 313; 4 H. & C. 377.

guage must be such as clearly to import the power granted or reserved.¹ The right only exists to the extent necessary to prevent a subsidence of the surface; and a withdrawal of all the minerals, that does not injure the surface, is not an interference with the surface owner's rights, and is not actionable (see all the cases cited). The right is absolute to the extent only that the surface must not be injured by a withdrawal of the minerals, but if the nature of the soil is such above the minerals as not to need their support, the entire mineral strata may be exhausted.

SEC. 200. It may be proper here to state, that a reservation of mines or minerals carries with it a right reasonably to work for the same; but there is this fact to be observed, that *mines*, according to the common and ordinary definition of the term, as well, also, as the legal application, signify a "way or passage under ground, a subterranean duct, course or passage, whether in search of metals or to destroy fortifications," etc., and the word "mineral," being derived from "mine," signifies that which is obtained by under-ground working, and not that which is dug from quarries, which are wrought from the surface.² But while a reservation of minerals authorizes their being taken out in a reasonable manner,³ yet it has been demonstrated by the cases referred to, that it only justifies their being taken when that can be done without injury to the surface. But where *quarries* are reserved, this, without any express reservation of a right to injure the surface, carries with it such a right as a necessary incident, because the natural and ordinary, as well as legal, import of the word, contemplates surface-working. A *quarry* signifies a *stone pit*,⁴ and refers to a place *above*, rather than *under*, the ground, and the intention of the parties, in all conveyances, being gathered

¹ *Earl of Cardigan v. Armitage*, 2 B. & C. 197; *Wakefield v. Duke of Buccleugh*, 4 H. L. C. 377; *Rowbotham v. Wilson*, 8 H. L. C. 345; *Bell v. Wilson*, 4 L. R. (Eq. Cas.) 303; *Harris v. Ryding*, 5 M. & W. 60; *Elliott v. N. E. R. Co.*, 10 H. L. C. 333; *Hext v. Gill*, 7 L. R. (Eq. Cas.) 699.

² *Encyclopedia Metropolitana*, 874; *Rex v. Brettell*, 3 B. & Ad. 424; *Rex v. Inhabitants of Sedgely*, 2 id. 65; *Darrell v. Raper*, 3 Drew, 294; *Brown v.*

Chadwick, 7 Irish C. L. 101; *Listowel v. Gibbings*, 9 id. 223; *King v. Dunsford*, 2 B. & Ad. 65. Also, see briefs of *BAILEY, Q. C.*, for plaintiffs, and *GIRFORD, Q. C.*, for defendant, in *Bell v. Wilson*, 4 Law R. (Eq. Cas.) 303; also opinion of *TURNER, L. J.*, in the same case.

³ *Earl of Cardigan v. Armitage*, 2 B. & C. 197.

⁴ *Johnson's Dictionary, Quarry.*

from the language used, the law makes this proper distinction between the reservation of a mine and a quarry.¹ Therefore, the reservation of minerals gives no right to take them out of the earth, except where it can be done without injury to the surface; but the reservation of quarries carries with it the right to dig the surface, because that power is necessarily implied as in accordance with the intention of the parties, because it is the only method by which the stone can be taken out.

SEC. 201. The right to *subjacent* support for land, it is said, is only applicable to the land in its natural condition, unincumbered by buildings or other structures that sensibly increase the pressure thereon; but, as has previously been explained, the mere presence of a building or other structure upon the surface does not prevent a recovery for injuries to the surface, unless it is shown that the subsidence would not have occurred except for the presence of the buildings. When the injury would have resulted from the act if no buildings existed upon the surface, the act creating the subsidence is wrongful, and renders the owners of the mines liable for all damages that result therefrom, as well to the buildings as to the land itself.²

SEC. 202. It is laid down in elementary books, and is to be found in the *dicta* of some of the cases, that a person may acquire a prescriptive right for the support of a building, either adjacent or subjacent.³ In *Stansell v. Jollard*, referred to in the previous note, Lord ELLENBOROUGH said: "When a man builds to the extremity of his land, and has enjoyed his building for more than twenty years, upon analogy to the rule as to lights, he acquires a right to support, or, as it were, of leaning to his neighbor's soil, so that his neighbor cannot dig no near as to remove his support,

¹ *Bell v. Wilson*, 4 Law R. (Eq. Cas.) 303.

² *Brown v. Robbins*, 4 H. & N. 186; *Jeffries v. Williams*, 5 Exch. 792; *Roberts v. Haines*, 6 E. & B. 643; 7 id. 625; 88 Eng. Com. Law, 625. Where the act is wrongful, the injury to the buildings may be recovered as consequential damages. *Bonomi v. Backhouse*, E. B. & E. 622; Eng. Com. Law,

vol. 96, p. 622; *Hamer v. Knowles*, 6 H. & N. 459; *Stroynan v. Knowles*, id. 454; *Partridge v. Scott*, 3 M. & W. 60; *Humphries v. Brogden*, 1 Eng. Law & Eq. 241; *Wyatt v. Harrison*, 3 B. & Ad. 871; *Harris v. Ryding*, 5 M. & W. 60.

³ *Stansell v. Jollard*, 1 Selw. N. P. 444; *Hide v. Thornborough*, 2 Car. & K. 250; *Dodd v. Holme*, 1 Ad. & El. 493; *Partridge v. Scott*, 3 M. & W. 220.

but otherwise as to a house newly built." This dictum of Lord ELLENBOROUGH is sustained by, or rather referred to in, numerous cases; but, it will be observed, that it is mere *dicta*, and is no part of the actual judgment in any of the modern cases,¹ and it is exceedingly difficult to see how any *prescriptive* right can thus be created. A builds a house upon his own land, adjoining the lands of B; in so doing he is in the exercise of a lawful right, and no right of action accrues against him in favor of B, for no right of B has been invaded, and no actual damage done. Then, upon what principle of law, as applicable to the doctrine of prescription, can it be said that A, after the lapse of twenty years, acquires a prescriptive right to have his lands supported by the lands of B. Lord ELLENBOROUGH says, that the acquisition of this right is in analogy to the doctrine of lights. But it seems that that right is not recognized in this country, and in England, even, it rests not upon the principles of the common law, but upon the Prescription Act, §§ 2, 3, Wm. IV, ch. 71. In *Solomon v. Vinters' Co.*,² POLLOCK, C. B., questions the soundness of any such doctrine in a very pertinent manner. He says: "It is difficult to see how the circumstance of the house having stood there twenty years makes any difference, or creates a right where houses are supposed to have been built by different adjoining owners, each with its own separate and independent walls, but upward of twenty years ago, one of them got out of the perpendicular, and leaned upon and was then supported in part by the others, so that if the latter were removed the other would fall. It cannot be a right by prescription, which supposes a state of things existing before the time of legal memory. It seems to us that, in the absence of all evidence as to origin or grant, the only way in which a right can be supported is that suggested by Lord CAMPBELL,³ namely, an absolute rule of law similar to that which is stated to have existed in the civil law. But there is no authority for any such rule to be found, at least none was stated to us. Lord

¹ *Palmer v. Fleshees*, 1 Siderfin, 167; *Hide v. Thornborough*, 2 Car. & K. 250; 61 Eng. Com. Law. 250; *Humphries v. Brogden*, 1 Eng. Law & Eq. 241; 15 Jur. 124; 20 L. J. (N. S.) Q. B. 10; *Thurston v. Hancock*, 12 Mass. 220; *La Sala v. Holbrook*, 4 Paige's Ch. (N. Y.) 169; *Bonomi v. Backhouse*, E. B. & Eq. 622; *Brown v. Windsor*, 1 C. & J. 27; *Partridge v. Scott*, 3 M. & W. 220; *Eno v. Del Vecchio*, 4 Duer, 53; *McGuire v. Grant*, 25 N. J. 356.

² *Solomon v. Vinters' Co.*, 4 H. & N. 597.

³ *Humphries v. Brogden*, 1 Eng. Law & Eq. 241.

CAMPBELL compares it to a right to light. But that right is created by the express enactment of the third section of the Statute of Wm. IV. And," he adds, "it seems contrary to justice and reason, that a man, by building a weak house adjoining to the house of his neighbor, can, if the weak house get out of the perpendicular and leans upon the adjoining house, thereby compel his neighbor either to pull down his own house within twenty years, or to bring some action at law, the precise nature of which is not very clear; otherwise, it is said, an adverse right should be acquired against him." It is true that in this case, as in all the others referred to in the preceding note under that head, this question of prescription did not form an element in the actual judgment of the case; but when it is remembered that the *dicta* of all the cases upon that point, from *Palmer v. Fleshees* to *Humphries v. Brogden*, was pressed upon the attention of the court by the learned counsel who argued the case, it must be regarded as a severe blow to the doctrine that a prescriptive right can be thus obtained, particularly when each of the judges (PARKE, BRAMWELL and MARTIN) expressed their doubts as to the existence or acquisition of any such right. It is a well-settled rule of law, that a right by prescription can only be acquired in the property of another by an adverse exercise of the right during the time and in the manner fixed by law. The right thus exercised must be in derogation of the right of another, and must be open and as of right. It is not essential that any actual damage should be done, but it must be of such a character as to operate as an invasion of another's right, and of such a character that an action could have been maintained at any time within the statutory period for the injury. Otherwise, the law will not presume a grant, and the right will not be acquired.'

¹ *Hastings v. Livermore*, 7 Gray (Mass.), 194; *Cooper v. Smith*, 9 Serg. & R. (Penn.) 33; *Solomon v. Vinters' Co.*, 4 H. & N. 599, 601; *Cooper v. Barber*, 3 Taunt. 99; *Polly v. McCall*, 37 Ala. 30; *Murgatroyd v. Robinson*, 7 E. & B. 391; *Crosby v. Bessey*, 49 Me. 539; *Parker v. Foote*, 19 Wend. (N. Y.) 309; *Bolivar Manufacturing Co. v. Neponset Manufacturing Co.*, 16 Pick. (Mass.) 241; *Hobson v. Todd*, 4 Durnf. & East, 71; *Flight v. Thomas*, 10 Ad. & El. 590;

Atkins v. Boardman, 2 Metc. (Mass.) 457; *Bliss v. Rice*, 17 Pick. (Mass.) 23; *Roundtree v. Brantley*, 34 Ala. 544; *White v. Chapin*, 12 Allen (Mass.), 516; *Perrin v. Garfield*, 37 Vt. 310; *Ricard v. Williams*, 7 Wheat. (N. S.) 59; *Pue v. Pue*, 4 Md. Ch. 386; *Steffy v. Carpenter*, 37 Penn. St. 41; *Yard v. Ford*, 2 W. Saund. 172; *Olney v. Fenner*, 2 R. I. 211; *Ingraham v. Hough*, 1 Jones (N. C.), 39; *Hammond v. Zehner*, 23 Barb. (N. Y. Sup. Ct.) 473; 21 N. Y. 118.

Now by the erection of a house upon his own land, a man invades no right of his neighbor, unless he extends his house upon, or projects it over that neighbor's land. The mere fact that he has increased the pressure upon the neighboring soil, is not an actionable injury; neither is it a fact that can be determined except by an actual excavation of the adjoining premises, nor even then with any degree of certainty. Would a court of law sustain an action against the owner of the house as for a nuisance, or compel an abatement of it as such at the suit of the neighbor? or would a court of equity restrain the construction of a house under such circumstances, upon the ground that it invaded the rights of an adjoining owner, and was a nuisance thereto? Clearly not. Then with what propriety can it be said, or according to what principle of justice could it be held that by the erection and continuance of the house for the statutory period, the owner acquires an absolute right to have it supported by the adjoining land? I apprehend that no such doctrine will ever find a foothold in this country, and that it cannot be said to be the doctrine of the courts of England. In *Napier v. Bulwinkle*, 5 Rich. (S. C.) 311, WARDLAW, J., thus pertinently attacked this doctrine: "When the enjoyment was in its nature hidden, or, although it was apparent, there were no ready means for resisting it within the power of the servient owner, *assent was not implied, and the influence of twenty years' time, therefore, not acknowledged.*"

This question was raised and directly passed upon by the court, in the case of *Mitchell v. The Mayor of Rome*, 49 Ga. 19, and the court directly held that no prescriptive right can be acquired for the support of any structure, as against the adjoining or sub-jacent soil. "Statutes of limitations," says TRIPPE, J., "apply to cases where one is in the *adverse possession* of property that may be claimed by another. The use cannot be adverse unless exercised in *denial of the title, and in derogation of the right of*

Union Water Co. v. Grary, 25 Cal. 509; *Pierce v. Cloud*, 42 Penn. St. 103; *Hal-ford v. Hawkinson*, 5 Q. B. 584; *Har-bridge v. Warwick*, 3 Exch. 552.

¹ See *Ludlow v. Hudson River R. R. Co.*, 6 Lans. (N. Y. Sup. Ct.) 128, where it was expressly held that the cause of

action only accrues from the actual happening of the injury, and not from the time when the support was re-moved. *Elliott v. N. E. R. R. Co.*, 10 H. L. Cas. 333; 2 Washb. Real Prop., 288; *Backhouse v. Bonomi*, 9 H. L. Cas. 508.

another. It cannot be adverse to another, *unless he has a right of action on account of a wrong done him.*" The doctrine of this case must commend itself to courts, as being not only sensible, but strictly in accordance with the principles applicable to all prescriptive rights. The boldness with which the court has stated its doctrines, and the soundness of the reasoning upon which they are predicated, must necessarily make this a leading case upon this question.¹

SEC. 203. Where railroad or canal companies have taken land under special statutes, for their necessary use in the construction of their works, specially providing therefor, or have acquired the same by special grant from the owner of the fee, they are entitled to the lateral and subjacent support of the soil therefor; and any act of the owner which interferes therewith, whether in excavating upon his lands or in taking out the minerals beneath the works, is an actionable nuisance, precisely the same as though the two estates were vested in individuals. Where the lands are taken by statute, and no provision is made for support, they are entitled to the support of the adjoining lands.² In the case of the *Caledonian R. R. Co. v. Sprot*,³ it appeared that the land had been granted to a railroad company, for the construction of their works. The defendant reserved the mines in the land, and in working the same weakened the surface. In the Scotch courts it was held that the defendant, having reserved the minerals, was entitled to take them out, even though in doing so the surface subsided. But their decision was reversed, and Lord CRANWORTH, in delivering the opinion of the court, said: "Those very able judges it seems to me to have overlooked or not to have given due weight to the conveyance to the company. If I am right, which I cannot doubt, in saying that Mr. Sprot, by his conveyance, conveyed to the company not only the land to be covered by the railway, but also, by implication, the right to all necessary support, then he cannot, by reason of his having reserved

¹ *Chasemore v. Richards*, 7 H. L. 349; *Webb v. Bird*, 13 C. B. (N. S.) 843.

² *Elliott v. N. E. R. R. Co.*, 10 H. L. Cas. 333; *Metropolitan Works v. Metropolitan R. R. Co.*, L. R., 3 C. P. 626; *Proud v. Bates*, 34 L. J. Ch. 407; *Caledonian R. R. Co. v. Lord Billhaven*, 3

Macy, 56; *N. E. Railway Co. v. Crossland*, 32 L. J. Ch. 357; *Goold v. Great Western Dup. Co.*, 2 D. J. & S. 600.

³ *Caledonian R. R. Co. v. Sprot*, 2 Macq. (Scotch) 449.

the mines, derogate from his own grant by removing that support. *In reserving the mines, he must be understood to have reserved them so far only as he could work them consistently with the grant he had made to the company.*" But in England, where railroads and canals are built under special acts, in which the minerals under the land taken for these purposes is reserved to the owners of the land, with power to take them out within a distance of ten yards, provided, however, that the companies shall have the right, upon notice, to pay the damages, and thus prohibit the working of the mines; it is held that, upon failure to pay the damages, the mine owners may take out the minerals, even though in doing so they let down the works and deprive them of support.¹

SEC. 204. In the case of the *Midland Railway Co. v. Checkley*, *ante*, the defendant, who was a lessee of part of lands that had been purchased by the plaintiffs for canal purposes, under an act of parliament containing such a provision, the minerals being reserved, was working a stone quarry so near the canal, but more than ten yards therefrom, as to endanger its safety. When the defendant had worked his quarries to within about forty yards of the canal, he gave the plaintiffs notice that unless they compensated him for the stone required to keep the canal secure, he should proceed to take it out, at the plaintiffs' risk. The plaintiffs replied that they claimed the right of support for their canal from the ground within an area of about thirty yards from the canal, and without further compensation. The defendant threatened, unless compensated, to go on with the operations of his quarry, and the plaintiffs filed their bill in equity, seeking to restrain the defendant from working the quarry within thirty yards of the canal, and also insisting that the defendant was not entitled to compensation, on the ground that stone is not embraced within the class denominated minerals, and that, by the purchase of the land for the purposes of their works, they by

¹ *Midland Railway Co. v. Checkley*, 4 L. R. (Eq. Cas.) 19; *Wryley Canal Co. v. Bradley*, 7 East, 368; *Birmingham Canal Co. v. Swindell*, 7 H. & N. 980 n.; *Birmingham Canal Co. v. Earl of Dudley*, 7 H. & N. 969; *Stourbridge Canal Co. v. Earl of Dudley*, 30 L. J. (Q. B.) 108; *Dudley Canal Co. v. Grazebrook*, 1 B. & Ad. 59; *Dunn v. Birmingham Canal Co.*, 4 Eng. R. (Moak's) 208; *Gt. Western R. R. Co. v. Bennett*, 2 L. R. (App. Ca.) 27.

implication took the right of support therefor from the lands of their grantee, adjacent and subjacent. But upon hearing the cause, Lord ROMILLY, M. R., held that "stone" was a mineral within the meaning of the act, and that the plaintiffs acquired no right to support from the minerals by the purchase of the lands, in view of the act which directly reserved the minerals to the owner, with power to work them, unless compensated therefor. So where land is purchased for such purposes, or taken by express statutes, and there is no provision therefor in the deed or in the act under which the land is taken, the right of support from the neighboring soil, adjacent and subjacent, would not arise by implication.¹

SEC. 205. The result of all the cases is that the owner of the mines can do no act that interferes with the natural condition of the surface; and, upon the other hand, the same obligation rests upon the owner of the surface to do no act upon his estate that will injuriously affect the estate below. Either may use their several estates for all the ordinary purposes for which such estates are usually used, so long as they do so without interfering with the estate of the other; but either changes essentially the natural condition of his estate at his peril. So long as no damage is done to the other by any change made by either, no action lies; but when such change on the part of either owner injuriously affects the other, an action lies, and liability attaches for all the consequences of his act. Thus if the owner of the surface changes the course of a stream upon the surface, or digs deep ditches or trenches in which water is collected, which percolates through the soil into the mine below, the surface owner is liable for all the damages that ensue.² The surface owner may drain his land, and for that purpose may dig trenches or do any act necessary to effect that end, but he must see to it that his ditches are kept open and properly discharge the water, for if, even in the exercise of a lawful act, he is guilty of negligence, whereby the mine owner is injured, he will be liable for all the consequences of his act.³

¹ Metropolitan Works v. Metropolitan R. R. Co., L. R., 3 C. P. 626; Washburn on Easements, 549.

² Bagnall v. London N. W. Railroad Co., 7 H. & N. 421; Elliott v. N. W. R. Co., 10 id. 353.

³ Bagnall v. The London and N. W. R. R. Co., 7 H. & N. 421.

This is, however, subject to the condition, that such drainage is not in derogation of the express or implied provisions of his grant.¹

SEC. 206. While the surface owner may use his lands for the ordinary purposes to which such lands are applied, and in the ordinary modes of enjoyment incident thereto,² yet, if he brings upon his premises, and collects and keeps there any thing which, if it escapes, will do injury to the mine owner, he is answerable for all the consequences of his act, whether guilty of negligence or not. As if he builds a reservoir and collects and keeps large quantities of water therein, he is bound to keep it in at his peril, and if it escapes and flows down into the mine, he would be answerable for all the consequences.³ So, too, if he should erect a powder magazine, or should keep nitro-glycerine or any other explosives, upon his premises, in case of an explosion, he would be liable to the mine owner for all the injuries sustained therefrom.⁴ In fact, the surface owner is liable to the mine owner or any other person for the consequences of any act committed by him that is in derogation of their rights,⁵ and the fact that the defendant was making a lawful use of his premises, or was using it for one of the ordinary purposes of life, and was in the exercise of the highest care, will not excuse him if the consequences are wrongful to and in contravention of the rights of another.⁶

SEC. 207. The law in reference to subjacent or lateral support and interferences therewith, is applicable to *any* interference with the natural condition of the earth either under its surface or ad-

¹ *Popplewell v. Hodgkinson*, 38 L. J. (N. S.) Exchq. 127.

² *Radcliffe's Exe'rs v. Brooklyn*, 4 N. Y. 195; *Popplewell v. Hodgkinson*, L. R., 4 Exchq. 248. In a recent case decided in the court of appeals in New York, *Marvin v. The Brewster Iron Co.*, 55 N. Y. 509; FOLGER ably discusses the relative rights of the owners of the minerals and of the surface, and the case is such a thorough exposition of the law in this country upon the various questions that arise between the owners of the surface and of the mines, that we commend it to the careful study of every person seeking in-

formation upon those questions. It came too late for an extended review in the text of this work, but the author regards its doctrines as extremely sound, besides being ably stated.

³ *Fletcher v. Ryland*, 1 L. R. (Exchq.) 263.

⁴ *Myers v. Malcolm*, 6 Hill, 292.

⁵ *Cahill v. Eastman*, 18 Minn. 324; 10 Am. Rep. 184.

⁶ *Ryland v. Fletcher*, L. R., 3 Exchq. 352; *Canterbury v. Attorney-General*, 1 Phill. 306; *Bailey v. Mayor*, 3 Hill (N.Y.), 531; *Bagnall v. London & N. E. Railroad Co.*, 7 H. & N. 423.

jacent thereto by whomsoever made. A railroad or canal company taking lands for the construction of their works, either by grant or statute, in the absence of a provision in the grant, or in the act under which the lands are taken, are bound by the same rules as apply to individuals, and have no power to tunnel or excavate their line so as to deprive the adjoining land owner of support, and if, in the construction of their works, they withdraw support from the adjacent lands, either lateral or subjacent, so as to injure the same, they are liable for all the consequences of their act unless compensation therefor was clearly contemplated and provided for by the act authorizing the taking of the lands. When they take land by grant for such purposes, it is their duty to take sufficient to enable them to construct their works without injury to the lands of adjoining owners, and when they take them by force of statutes, they take no more than the statute gives, and can acquire no right to do any injury to the adjoining owner that is not contemplated and embraced in the appraisal of land damages.¹ The right of support being a right naturally incident to the land and a part of the freehold, is property in the fullest sense, and cannot be taken without compensation for any purpose. Therefore, whenever lands are taken for public purposes and the damages are appraised, it is always a question whether the statute contemplated an appraisal simply of the value of the land or damages for all the consequential injuries that will result therefrom, including the injury to support, and this is a question of law arising upon the construction of the act. Such appraisals are usually construed to cover all the *natural* and *probable* consequences of the act, but not extraordinary or remote damages that could not have been foreseen. Injury to support where excavations are *necessary*, and known to be so at the time when the appraisal is made, would doubtless be treated as coming within the injuries contemplated and covered by the appraisal of damages. But this is necessarily a mixed question of law and of fact.² But as these questions will be more fully treated in a sub-

¹ *Baxter v. Vermont Central Railroad Co.*, 22 Vt. 365; *Walford on Railways*, 197-8; *Babcock v. Western Railroad Co.*, 9 Metc. (Mass.) 555; *Sabin v. Vermont C. R. Co.* 25 Vt. 363; *Steele*

v. Western Midland Lock Nav. Co., 3 Johns. (N. Y.) 286.

² *Ludlow v. Hudson Railroad Co.*, 6 Lans. (N. Y. Sup. Ct.) 128; *Clarke's Adm'rs v. Han. & St. Jo. Railroad Co* 36 Mo. 98.

sequent chapter under the head of "Legalized Nuisances," it may not be advisable to pursue the matter further here. I will therefore leave the subject by simply stating that, whenever compensation has been given for injuries to support for railroad or canal purposes, this does not absolve the companies from the exercise of care and skill in the prosecution of the work, and for all damages that result from an excess of their powers or a negligent or improper exercise of their rights, either in the construction or maintenance of their works, they are liable.¹

SEC. 208. Where land is purchased for a particular purpose, as for the clay or sand thereon, and this is expressly stated in the conveyance, yet this does not give to the grantee the right to withdraw the lateral support from the grantor's land in taking out the materials. In such a case whether the property in the clay or sand is conveyed by a deed of the land, or reserved in a conveyance of the lands, the person removing it is subject to the same liabilities as, and acquires no more rights than, any other land owner.²

It is not the original digging away the soil that creates the right of action, but the actual injury; therefore, even though the injury was not the result until several years after the removal of support, an action lies for the injury, as the cause of action only accrues when the injury begins.³

SEC. 209. Lest misapprehension should arise it should be stated, that the withdrawal of the support of soil, at however great a distance from the lands injured, is actionable, if the causation can be traced clearly to the original act of withdrawal. That is, if A, B and C are the owners of three several tracts of land. A's land adjoining B's and B's land adjoining C's, if C

¹ *Steele v. W. Mid. Lock & Nav. Co.*, 2 Johns. (N. Y.) 286; *Sabin v. Vermont Central Railroad Co.*, 25 Vt. 363; 1 Strange, 334; *Governor, etc. v. Meredith*, 4 T. R. 794; *Espinasse's Digest*, 598; *Baxter v. Railroad Co.* 22 Vt. 365; *Rex v. Hungerford Market Co.*, 3 M. & W. 622; *Rex v. Nottingham Water-Works Co.*, 6 Ad. & El. 355; *Manning v. Eastern Counties Railroad Co.*, 12 M.

& W. 237; *Turner v. Railroad Co.*, 10 id. 425; *Dunn v. Birmingham Canal Co.*, 4 Eng. Rep. (Moak) 208.

² *Ryckman v. Gillis*, 6 Lans. (N. Y. Sup. Ct.) 79; *Ludlow v. Hudson R. R. Co.*, id. 128.

³ *Ludlow v. H. R. R. Co.*, 5 Lans. (N. Y. Sup. Ct.) 128; *Marvin v. Brewster Iron Co.*, 55 N. Y. 509.

excavates his own land so as to withdraw the support from the land of B, and as a consequence B's land falls into C's pit, or subsides, and thus lets down A's land, C is liable for the injury to the lands of A as much as for the injury done to B's land. The nuisance consists in the withdrawal of the support from B's soil and he is answerable for all the natural and probable consequences that flow from the act. It is no defense that A and B or either of them could have prevented the injury to their lands by something done by them upon their own, neither is it any excuse that the action of the elements have contributed to the injury, for it is the right of every land owner to have his land in its natural condition, supported and upheld by the soil of others if necessary, and if the injury is primarily traceable to the original act of C in excavating his lands, and would not have happened except for the excavation so made by him, he is liable for all the damages that result from his act.¹

The same rule applies as well to subjacent adjacent as to lateral adjacent support. In *Bonomi v. Backhouse*, the excavation causing the injury was nearly eight hundred feet from the plaintiff's lands, and the court held that, so long as the causation could be distinctly traced and proved, the distance at which the original excavation was made is not important. Neither is it necessary that the effect should immediately follow the wrongful act. If the injurious consequences are clearly traceable to the act, it makes no difference that the actual injury does not happen for a long period thereafter. When the injury *does* occur, a cause of action arises, and the statute of limitations only begins to run when the damage results, and not from the doing of the original wrongful act.²

SEC. 210. In the case of *Ludlow v. Hudson River R. R. Co.*, the defendant purchased of the plaintiff two parcels of land, one of which pieces was designated in the conveyance to be for the uses and purposes of said railroad, and the other for *materials*. In

¹ *Bonomi v. Backhouse*, E. B. & E. 622; 9 H. L. Cas. 503; *Stroynan v. Knowles*, 6 H. & N. 454; *Hamer v. Knowles*, id. 459; *Robbins v. Brown*, 4 id. 186.

² *Elliott v. N. E. R. R. Co.*, 10 H. L. Cas. 383; *Ludlow v. H. R. R. Co.*, 6 Lans. (N. Y. Sup. Ct.) 128; *Shaw v. Thackerah*, 1 L. R. (C. P.) 564; *Webb v. Bird*, 13 C. B. (N. S.) 843; *Chase-more v. Richards*, 7 H. & N. 340.

1851 the defendant excavated the land and removed the earth from the piece purchased for *materials*, and used the same in building their embankment for said road. The excavation was made to the depth of twenty-five or thirty feet. It was left in that condition until the spring of 1864, when a slide occurred where the excavation had been made, and about three and a half acres of the plaintiff's land slid down; the defendant moved to dismiss the complaint upon the ground that the plaintiff sold the land upon which the excavation was made *for materials*, and that the defendant was thereby authorized to take the materials contained within the lines granted, without binding the defendant in any manner to protect the embankment against a slide.

That there was no evidence of negligence, and that the action was barred by the statute of limitations so far as the injury by the defendant has any application, as it occurred more than six years before the commencement of this action, the right of action only existing at the time that the digging was done.

It will be noticed that seven years elapsed between the doing of the wrongful act, and the actual happening of the injurious consequences. But the court held that none of the grounds upon which the defendant moved for a dismissal of the complaint were tenable, and refused to dismiss the complaint.

MILLER, P. J., in commenting upon the branch of the case relating to the statute of limitations, said: "I think that the action was not barred by the statute of limitations. *The injury complained of* did not accrue until April, 1864, and the action was commenced in March, 1866. *The damage did not exist*, and had not been incurred when the work was done, or within six years thereafter. If an action had been brought before they occurred, the damage would have depended upon mere probability and the wildest conjecture. The consequential injury had not happened until the land of the plaintiff had slid away; and hence no action could be maintained for the damage arising in consequence thereof." The result of this decision is clearly sustained upon principle, by all the English and American cases bearing upon that question relative to injuries arising from a nuisance. The only error is in leaving it to be inferred that an action at law might have been brought for the withdrawal of

support merely, before any actual damage had arisen; I do not think the court intended to be so understood, but the opinion is so framed as to give rise to that inference. If the court intended to so hold, their decision was clearly wrong, for, if the original act of withdrawing the support was actionable, then the statute of limitations began to run from that time, and after six years was a complete bar to all the consequences of the act. But I apprehend that the court did not intend to be understood as holding or even intimating that an action could have been maintained before injury done. I am aware of but one case in which any such doctrine has been held, and that was not a case in which the question was a necessary element of the judgment, and was so clearly in opposition to the law of support, that its doctrine was never adopted, and it is not regarded as an authority upon that point, and in effect, has been repeatedly overruled. I refer to the case of *Nicklin v. Williams*, 26 Eng. Law & Eq. 549.¹ In that case the plaintiff was the owner of the surface, and the defendant of the minerals beneath. The defendant took out the minerals, exhausting the entire stratum, and thus withdrawing the support from the surface. No actual damage had resulted therefrom, but the parties apprehending such a result, the plaintiff accepted from the defendant a sum agreed upon therefor. Subsequently the surface subsided, and the plaintiff sustained heavy damage thereby. He then brought his action therefor, and the court held that he was barred by the previous settlement. To that extent, the court was clearly right, but the court went further and laid down the doctrine that "the withdrawal of any part of the stratum, to the support of which the owner of the adjacent soil or house is entitled, is a cause of action, as an injury to a right, although no immediate damages ensue, and no fresh cause of action arises by the occurrence of subsequent damage." If the doctrine of this case was to be regarded as authoritative, all actions for consequential injuries arising from withdrawal of surrounding soil, would be barred in six years, because the right of action accrues from the time when the excavation was made, and all subsequent injuries are only

¹ *Shaw v. Thackerah*, 1 L. R. (C. P.) (N. S.) 848; *Chasemore v. Richards*, 7 564; *contra*, *Webb v. Bird*, 13 C. B. H. & N. 349.

consequences of the original wrong, that go in aggravation of damages. But, the doctrine of this case has never been adopted or treated by the English courts as authority, and is clearly opposed to the doctrine of *Backhouse v. Bonomi*, 9 H. L. Cas. 503, and to the general tenor of all the cases in which the law of support is involved.¹

SEC. 211. Where land is conveyed with buildings standing upon it, or where it is sold for the purpose of building, the grantor owning the land on either side, a right of support passes to the grantee both for his land and buildings by implied grant.²

So, too, where buildings are erected upon an estate before severance thereof, a right of support goes with the house by implication.³ So, too, I think it may fairly be said, although there are no cases in which the point is directly decided, that where the owner of a lot of reasonable area places his house in the center of his lot, making reasonable provision for support therefor from his own land, that an injury thereto from an unusual or unreasonable excavation upon adjoining lands, whether negligently conducted or not, would be actionable.⁴

SEC. 212. As between two adjoining houses or other buildings, no right to mutual or lateral support can be acquired by prescription. This question was raised and directly decided in the court of exchequer, in *Solomon v. Vinters' Co.*⁵ In that case the plaintiff owned and occupied a house on Pilgrim street in London. It was built on a hill, descending slightly toward the west; adjoining to and next below the plaintiff's was another house belonging to a third person, and next adjoining this were two other houses belonging to the defendants, one of their houses

¹ *Wilde v. Minsterly*, 2 Rolle's Abr. 384; *Bibby v. Carter*, 4 H. & N. 153; *The Caledonian R. R. Co. v. Sprot*, 2 Macq. 449; *Rawbotham v. Wilson*, 6 E. & B. 593; 8 H. L. Cas. 348; *Stroyman v. Knowles*, 6 H. & N. 454; *Brown v. Robbins*, 4 id. 186; *Hunt v. Peake*, Johns. Ch. (Eng.) 715; *Thurston v. Hancock*, 12 Mass. 220; *Farrand v. Marshall*, 21 Barb. 409; *Harris v. Ryding*, 5 M. & W. 60; *Partridge v. Scott*, 3 id. 220; *Moody v. McClelland*, 39 Ala. 45.

² *Caledonian R. R. Co. v. Sprot*, 2 Macq. 449; *Mardin v. Black*, 34 L. J. (N. S.) C. P. 337; S. C., 13 Week. R. 896.

³ *Richards v. Rose*, 9 Exchq. 218.
⁴ *Am. Law Review*, vol. 1, p. 14; *Farrand v. Marshall*, 19 Barb. (N. Y. Sup. Ct.) 380.

⁵ *Solomon v. The Vinters' Co.*, 7 Am. Law Reg. 622; 4 H. & N. 585; *Kempston v. Butler*, 12 Ir. C. L. 516; *Peyton v. Mayor of London*, 9 B. & C. 736; *Partridge v. Scott*, 7 M. & W. 220.

being on the corner of the street, and the other in the adjoining street. These houses had all stood for more than thirty years out of perpendicular, and leaning west, and really supported and upheld by the defendants' houses. In 1857 the defendants tore down these houses, and the plaintiff's house being thus deprived of the support furnished thereby, fell, doing considerable damage. The plaintiff was nonsuited, and upon a case reserved, POLLOCK, C. B., said: "It is difficult to see how the circumstance of the houses having stood for twenty years makes any difference or creates any right. Where houses are supposed to have been built by different adjoining owners, each with its own separate and independent walls, and that upwards of twenty years ago one of them got out of perpendicular, and leaned upon and was supported in part by the other, so that if the latter were removed the latter would fall, the question is, whether any right of support is thereby obtained? It cannot be a right by prescription which supposes a state of things existing before the time of legal memory. It seems to us, that in the absence of all evidence as to origin or grant, the only way in which such a right can be sustained, is that suggested by Lord CAMPBELL, in *Humphries v. Brogden*, namely, an absolute rule of law similar to that which is stated to have existed in the civil law. *But there is no authority for any such rule to be found.* It seems contrary to justice and reason, that a man by building a weak house adjoining to his neighbor's, can, if that weak house gets out of perpendicular and leans upon the adjoining house, thereby compel his neighbor either to pull down his own house within twenty years so as to prevent a right from being acquired, or to bring some action at law, the precise nature of which is not very clear, or have a servitude imposed upon his house to the extent of affording support for his neighbor's weak house."

In this case the plaintiff's house *did not adjoin* the defendants' house, and therefore the question as to what would have been the effect if the plaintiff's house during that period had actually leaned upon the defendants' house, was not considered. In such a case, the plaintiff's house projecting over the defendants' premises for more than twenty years, would have been an actionable injury during the entire period, and would have pre-

sented an entirely different question. But, while the plaintiff might have acquired a right by such a continuous user, to have his house project over defendants' land, he would acquire no right to have it lean against, and be supported by his buildings.¹ Such a right is not a natural right,² and can only exist where both houses have been so built as to be mutually dependent upon, and subservient to each other, neither of them being capable of standing without the support of the other. In such a case it is held that the alienation of one of the houses does not deprive the grantor of the support of the houses aliened for the one retained by him³ so long as the wall continues to be sufficient for the purpose, and the buildings in such a condition as to need support. The easement ceases when the wall falls into decay, and ceases to possess the requisite strength, or when either of the buildings is destroyed, or becomes so dilapidated as to make a new building reasonably necessary.⁴

DAMAGES.

SEC. 213. The rule of damages in cases of injury to support where there are no buildings, is the actual domination in the value of the lot and not the expense of restoring the lot to its former condition by means of a wall or other permanent structure.⁵

Where the injury is both to the soil and buildings or other structures standing thereon, the rule is as stated above, with such addition thereto for injuries to the building as will put the plaintiff in as good position as he was before, both as to house and wall. If the house was a new one the cost of the building would furnish the measure, but if not, such damages are recoverable as will put the party in as good a condition as he would be if the injury had not occurred.⁶ In *Charles v. Rankin*, 22 Miss. (1 Jones) 566, the rule was thus laid down: "The rule of damages

¹ *Peyton v. The Mayor of London*, 9 B. & C. 736; *Richards v. Rose*, 9 Ex. 218; *Partridge v. Scott*, 7 M. & W. 220.

² *Rawbotham v. Wilson*, 8 E. & B. 123.

³ *Richards v. Rose*, 9 Exchq. 218; *Peyton v. The Mayor*, 9 B. & C. 736;

Kempston v. Butler, 13 Ir. C. L. 516; *Suffield v. Brown*, 33 L. J. Ch. 249.

⁴ *Partridge v. Gilbert*, 15 N. Y. 601; *Sherred v. Cisco*, 4 Sandf. (N. Y.) 480.

⁵ *McGuire v. Grant*, 25 N. J.

⁶ *Shrieve v. Stokes*, 8 B. Monr. (Ky.) 453; *Hide v. Thornborough* N. P., 2 Clark, 250.

should be the amount of money required to rebuild the plaintiff's house as it was before the fall; and the value of the house thrown down and the time necessarily taken to rebuild it, with the interest on those amounts, from the time when the house fell until the present time." When the buildings are occupied for business purposes in addition to the actual injury to the building, fixtures and machinery, a recovery may be had for the loss of the profits of the business arising from the injury.¹

CHAPTER SIXTH.

PARTY WALLS AND MUTUAL SUPPORT.

SEC. 214. Injury to easements, nuisances.

215. Party walls. Rule of civil and common law.

216. Usual mode of creating party walls.

217. Easement passes by deed as an appurtenance.

218. Rule in *United States v. Appleton*.219. Rule in *Thayer v. Payne*.

220. Equitable estoppel where wall is built by agreement.

221. When entire walls of building are party walls.

222. Obligations to contribute for building or repairs.

223. Liability where wall is built under agreement to contribute when used.

224. Liability for contribution between adjoining owners when built by agreement.

225. Rule in *Cole v. Curtis*.

226, 227. Rule in various States.

228. How each owner may use the wall.

229. The easement only exists while the wall serves a useful purpose.

230. Rule in *Campbell v. Messier*.231. Rule in *Sherred v. Cisco*.

232. Relative rights of parties.

233. When wall becomes unsafe, either party may repair.

234. What changes may be made.

SEC. 214. It is not alone interferences with corporeal rights that constitute a nuisance, but injuries also to incorporeal rights or easements are equally so.

Thus where A has a right of way over the lands of B, either by grant, prescription or necessity, any obstruction thereof is a

¹ *Hamer v. Knowles*, 4 H. & N. 459.

nuisance, and A can bring his action on the case as for a nuisance against the party making the obstruction. So when C has purchased of D a lot with a house erected thereon upon the extremity of the lot adjoining another, but belonging to D, with windows or a door opening upon the land of D, C thereby acquires an easement in the lot of D adjoining, to the extent that neither D or his grantors can build upon the adjoining lot so as to shut up either his windows or the door. The law raises an implied grant to C of a right to have the light and air enter those windows without obstruction, and a right of ingress and egress over D's land to and from the door, and any interference with either of those rights, is a nuisance, precisely as much as though the injury was to a corporeal right. So, also, where A and B have mutual easement in a party wall for the support of their building, any interference therewith by either, to the injury of the other, is a nuisance, and while the method of creating and the other incidents connected therewith more properly come within the province of a work on easements, yet for the better understanding of the questions of nuisance thereto, and for the greater convenience of persons seeking information upon the question, I have deemed it expedient to trench somewhat upon the province of writers on easement. For further information upon the question than I have been able to give here, the reader will find the subject most thoroughly treated in Washburn on Easements, under the head of Party Walls.

SEC. 215. By the civil law an urban servitude was recognized, on the part of adjoining lot owners, to fix their beams, timbers and other supports for their buildings, in the walls of his neighbor.¹

In France no agreement between the parties, express or implied, is necessary to enable an adjoining owner to make use of his neighbor's wall as a support for his building, even though the wall is built entirely upon the neighbor's land, but at its extreme verge. The only conditions to its use by the other are, first, that the wall is of sufficient dimension and capacity to afford the support; and secondly, that upon its use, the neighbor shall pay to the owner a fair, ratable proportion of the expense of the wall.

¹ Ayl Pandects, 809, D. 8, 22.

But until the wall is applied to such use by the adjoining owner, he cannot be required to contribute to the expense of its construction or maintenance.¹

But, by the common law, party walls exist only by virtue of statutory provisions, grant or prescription. If one lot owner erects a building upon the extremity of his land, the walls of which are entirely within his own domain, an adjoining owner cannot use the wall to support his timbers without rendering himself liable as a trespasser. But if he fastens his timbers in the wall by the consent of the owner and maintains them there uninterruptedly for twenty years, or the usual statutory period, the wall becomes charged with the servitude of support as a party wall, and to that extent the owner loses his absolute and entire control over the wall.

SEC. 216. This is true not only of the foundation wall,² but of the entire wall of the building abutting upon the adjoining premises, so far as it is made use of by, and furnishes support for, the building of the adjoining owner. But the most usual and ordinary method of creating party walls is where the owner of adjoining lots erects a block of buildings thereon, the walls of each part of the block mutually supporting each other, and conveys the several parts, making the wall the dividing line between the two.

SEC. 217. So, too, under such circumstances, even though the wall is not made the division line, a conveyance of a part of the block in the usual form with all appurtenances passes an easement for the support of the part of the building so conveyed,³ and there can be no question but that the easement would pass, even though the word "appurtenance" was wholly omitted from the conveyance.

SEC. 218. The easement is open and apparent, and passes as an incident to, and a part of the estate, the same as any other easement.

¹ 3 Toullier, *Droit Civil Francais*; Y.), 553; *Eno v. Del Vecchio*, 4 Duer 581. ² Duranton, *Cours de Droit Francais*; (N. Y.), 53.

³ *Eno v. Del Vecchio*, 6 Duer (N. Y.), 581. 17; *Glen v. Davis*, 35 Md. 208; 6 Am.

⁴ *Webster v. Stephens*, 5 Duer (N. Rep. 389.

This principle has been frequently recognized and adopted by the courts both of this country and England. In the case of the *United States v. Appleton*, 1 Sumn. (U. S.) 492, this doctrine was directly held, and that too as applicable to an easement of far less importance than the easement of support from party walls. In that case it appeared that in 1808, a block of buildings was erected in Boston, consisting of a central building and two wings, with a piazza extending along in front of and for the entire length of the central building, with doors in the sides of the wings, which opened on and swung over the piazza, the upper part of which doors had glass in them and were used as windows. In 1811 the two wings were conveyed to different persons, no mention being made in the conveyance of the doors opening upon the piazza. In 1816 the central building was sold and conveyed to the United States. The government claimed the right to erect a building to cover their entire lot, which would close up the doors of the wings, but the court held that the use of these doors and windows passed as appurtenances, and that too without any reference to the length of time they had been used.

SEC. 219. In *Thayer v. Payne* (2 Cush. [Mass.] 327), the plaintiff and defendant were the owners of adjoining lots. The defendant derived his title from the plaintiff. When the plaintiff conveyed to the defendant there was a drain extending from the defendant's cellar through the lands of the plaintiff and discharging itself through an outlet beyond. The drain was not referred to in the deed. The drain getting choked up and out of repair, the defendant entered upon the plaintiff's premises to repair the same. For this entry the action was brought. In the deed from Thayer to the defendant there was a clause as follows: "To have and to hold the afore-granted premises *with* the privileges and appurtenances thereto belonging at the time of the purchase thereof by the said Thayer and French." The drain was not constructed at the time of the conveyance to Thayer and French, but was made by the plaintiff afterward, and therefore was not embraced within the express provisions of the granting clause of the deed. But it was in existence and use at the time when the premises were conveyed to the defendant, and this being so, the court held that

it passed as an easement connected with and appurtenant to the premises, even though the word "appurtenance" had not been used in the conveyance. There are a multitude of cases in which this doctrine is held both by the courts of this country and England, but we have not the space, neither is there a necessity to refer to them here.¹

SEC. 220. Where adjoining lot owners, by agreement, construct a wall partly on each lot for the mutual support of their buildings, if the wall is so used by them for the period of twenty years, it becomes a "party wall" within the legal meaning of the term, and subject to all the legal incidents applicable thereto.² And there can be no question but that the same is true, where two persons, by agreement, erect a wall thus and put up their buildings, mutually depending upon each other for support, so that even though twenty years have not elapsed, either would be equitably estopped by the agreement and the acts done in pursuance of, and reliance on it, from interfering therewith to the injury of the other, so long as the wall remains in a sound condition.³

SEC. 221. A party wall, in its ordinary legal import, signifies a dividing wall between two buildings belonging to different owners, to be used equally by them for the mutual support of their respective buildings.⁴

This easement can only be created by grant, statute or prescription. Where it is created by grant or statute it can only be used in the manner therein designated, and any other or different use is a violation of the rights of the other owner, and actionable.⁵

¹ *Nicholas v. Chamberlain*, Cro. Jac. 121; *Robbins v. Barnes*, Hob. 131; *New Ipswich Factory v. Batchelder*, 3 N. H. 190; *Cox v. Matthews*, Ventris, 237; *Pyer v. Carter*, 1 H. & N. 916; *Hills v. Miller*, 3 Paige's Ch. (N.Y.) 254; *Alston v. Grant*, 3 E. & B. 128; *Suffield v. Brown*, 10 Jurist (N. S.), 111; *Nichols v. Luce*, 24 Pick. (Mass.) 102; *Perrin v. Garfield*, 37 Vt. 312; *Hathorn v. Stinson*, 10 Me. 224; *Baliss v. Kennedy*, 43 Ill. 71; *Strickler v. Todd*, 10 S. & R. (Penn.) 63; *Lampman v. Milks*, 21 N. Y. 509.

² *Webster v. Stephens*, 5 Duer (N. Y.), 553; *Eno v. Del Vecchio*, 4 id. 53; *Vollmer's Appeal*, 61 Penn. 118; *Burton v. Moffatt*, 3 Oregon, 29.

³ *Potter v. White*, 6 Bos. Sup. Ct. (N. Y.) 644; *Maxwell v. The East River Bank*, 3 Bos. (N. Y.) 124; *Brooks v. Curtiss*, 4 Lans. (N. Y. S. C.) 283; *Aff'd Ct. of App.*, 50 N. Y. 601.

⁴ *Fetteretch v. Leames*, 9 Bos. S. C. (N. Y.) 510.

⁵ *List v. Hornbrook*, 2 W. Va. 346; *Fetteretch v. Leames*, supra; *Washb. on Easements*, 579.

The mere fact that a wall has been built partly upon two adjoining lots and is used by both, does not make it a party wall,¹ nor does the fact that an adjoining owner has inserted the timbers of his building into the walls of the other owner, without permission, give him any right to the support of the wall, even though done without objection, unless there has been an *express* and *unequivocal* ratification of the act, or it has been continued for the statutory period.²

SEC. 222. As has previously been stated, the right to support from party walls extends to all that portion of the partition wall which is used by, and is necessary for the support of, either building. So, too, a condition of things may arise by grant where the entire walls of a building may become party walls and charged with the servitude of support. This state of things arises where different stories of a building have been conveyed to different parties either by lease or deed. As where A owns the basement, B the second story and C the third story of the same building, A's part of the tenement is charged with the servitude of support for the part owned by B and C, and the portions owned by A and B are charged with the servitude of support for C's part, and neither can interfere with the walls, so as in any wise to injure or impair the rights of either of the others, except subject to the conditions and liabilities created by the law and applied to party walls, which will be defined hereafter.³ The case last named is a condition of things often existing, but which presents the novel spectacle of a conveyance of land, when no land is conveyed, but rather a right of dominion over the space above the land, which, in the eye of the law, is a part of the freehold. When the grant makes no provision for rebuilding the structure conveyed upon its destruction, where the conveyance is in fee, novel and difficult questions might arise as to the rights of B and C in case either of them should desire to rebuild, and A refuses to do so.

¹ *Roberts v. White*, 2 Rob. (N. Y. Sup. Ct.) 425.

² *McConnell v. Kibbee*, 33 Ill. 175; For the law controlling this class of cases, see *Cheeseborough v. Green*, 10 Conn. 318; *Loring v. Bacon*, 4 Mass. 575; *Graves v. Berdan*, 26 N. Y. 501;

Ottumwa Lodge v. Lewis, 34 Iowa, 67; *Anonymous*, 11 Modern, 7; *Humphries v. Brogden*, 12 Q. B. 739; *Smart v. Morton*, 5 E. & B. 30; *Calvert v. Aldrich*, 99 Mass. 74; *Winton v. Cornish*, 5 Ohio, 477; *Stockwell v. Hunter*, 11 Metc. (Mass.) 445.

SEC. 223. Where party walls are erected by one of two adjoining lot owners, the wall resting upon the lands of both, there is no obligation at common law on the part of the other owner to contribute toward the expense of the construction of the wall, when he subsequently uses it as a support for a building erected by him. This doctrine rests upon the principle that the land owner is to be his own judge as to what disposition he will make of, or what erections he will make upon, his land, and that he is not to be benefited without his own request or sanction.¹

But where two adjoining owners have erected a party wall at their joint expense, and have applied it to their joint benefit, each is bound to contribute ratably toward the expense of its necessary repair. But if the wall has become ruinous and fallen into decay, or is destroyed by fire or other cause, no liability exists on the part of either owner to contribute toward the construction of a new wall, if he has no present use therefor, even though he subsequently makes use of the wall by building thereon.² The owners of a party wall are not regarded as tenants in common of the land or of the wall, but each owns his share in severalty.³ But where the buildings upon the two lots are still standing, if the wall gets out of repair, each owner is bound to contribute to its repair, and so if the wall becomes ruinous or falls into such a state of decay as to render a *new* wall necessary, it has been held that the obligation to contribute to the construction exists to such an extent, that if one owner rebuilds it even against the remonstrance of the other he will be entitled to be reimbursed by the other to the extent of the expense of restoring a wall of equal dimensions, and of the same quality of materials of the old wall, but not for additional expense by building a larger wall or of more expensive materials.⁴ But this liability does not exist except where there is a *real necessity* for repairs, or a new wall, and *never* when the expense is incurred merely to suit the convenience, or to serve the capricious ends of

¹ Moore v. Cable, 1 Johns. Ch. (N.Y.) 385; Gillett v. Maynard, 5 Johns. 85; Dewey v. Osborn, 4 Cow. (N.Y.) 329; Erwin v. Olmstead, 7 id. 229; Sherred v. Cisco, 4 Sandf. (N.Y.) 480; Abrahams v. Krautler, 24 Mo. 69.

² Sherred v. Cisco, 4 Sandf. (N.Y.)

480; Glen v. Davis, 35 Md. 208; 6 Am. Rep. 389.

³ Watt v. Hawkins, 5 Sandf. 20; Brooks v. Curtis, 50 N.Y. 639; Partidge v. Gilbert, 15 id. 601.

⁴ Campbell v. Mosier, 4 Johns. Ch. (N.Y.) 334; Floramer v. Maittott, 22 Iowa, 114.

one of the owners, or when the adjoining owner has no farther use for the wall, nor, it seems, when the wall has become so ruinous as to serve no useful end. 'Indeed, the doctrine of *Campbell v. Mesier*, so far as relates to contribution toward a new wall, has been doubted and virtually overruled in *Sherred v. Cisco*,¹ and *Partridge v. Gilbert*,² and in the latter case, the doctrine which seems more consistent with reason and the nature of the easement, is held, that the easement in a party wall ceases when the wall falls into such a ruinous condition as to serve no useful purpose except by being replaced by a new one, and that neither owner has a right by the common law, against the remonstrance of the other, to rebuild the wall and claim contribution therefor.'

The easement ends with the destruction of that in which it existed, and in the absence of a binding covenant between the parties or running with the land, neither party can be compelled to rebuild it, or to contribute toward the expense thereof if it is rebuilt by the other.⁴ When the wall becomes ruinous and in such a state of decay as to be virtually a nuisance, the easement is ended, and, while either party may rebuild at his own expense, he cannot compel the other party to contribute thereto.⁵

SEC. 224. Where two adjoining owners enter into an agreement by which one of them erects a party wall resting upon the land of each, and erects a building thereon, under a promise from the other owner that whenever he uses the wall by the erection of a building thereon, he will pay one-half of the expense of the construction, this is not a covenant running with the land, and will not be binding upon, nor can it be enforced against a grantee of the adjoining lot in favor of the grantee of the builder of the wall, even though he uses the wall as a support for a building erected by him after his purchase of the premises. The *benefit* of a covenant passes with the land to which it is incident, but the liability imposed by the covenant is confined to the original covenantor, unless a privity of interest between him and the

¹ *Sherred v. Cisco*, 4 Sandf. (N. Y. Sup. Ct.) 480.

² *Partridge v. Gilbert*, 15 N. Y. 601.

³ *Partridge v. Gilbert*, 15 N. Y. 601; *Sherred v. Cisco*, 4 Sandf. 480.

⁴ *Glen v. Davis*, 35 Md. 308; 6 Am.

Rep. 389; *Pentz v. Brown*, 5 N. Y. Leg. Obs. 19; *Webster v. Stevens*, 5 Duer (N. Y. Sup. Ct.), 553; *Daniel v. North*, 11 East, 372; *Partridge v. Gilbert*, 15 N. Y. 601.

⁵ See cases cited in note 4.

covenantee exists or is created at the time when the covenant is made. Such a covenant is personal to the builder, and does not pass by grant.¹

SEC. 225. In a recent case in the commission of appeals of the State of New York (*Cole v. Curtis*, 54 N. Y. 444), this very question was decided. In that case it appeared that in 1861 the grantor of the plaintiff and defendant being the owners of adjoining lots in the city of Brooklyn entered into an agreement in writing, by which it was agreed that the plaintiff's grantor should erect the western wall of a building that he was about to put up on his lot, as a party wall resting partly upon the land of each. This agreement was recorded, and the plaintiff's grantor erected the party wall and building in question, and subsequently conveyed it to the plaintiff. After various conveyances, the adjoining lot came into the possession of the defendant, who erected a building upon it, using the party wall in question. Declining to reimburse the plaintiff for one-half the expenses of the wall according to the agreement between their respective grantors, this suit was brought. But the court held that no recovery could be had, even though the defendant had constructive notice of the agreement made by his grantor with the grantor of the plaintiff.

SEC. 226. In Pennsylvania where there is a special statute providing that "the first builder shall be reimbursed for one moiety of the charge of the party wall, or for so much as the next builder shall use before he breaks into the wall," it was held in the cases referred to in the previous note, that this right to compensation was a mere chose in action, and did not pass from the first builder by his grant of the land, and that his grantee could not enforce it either at law or in equity.

A similar doctrine is held in West Virginia.² But in Ohio it is held that such an agreement, although not under seal, will be recognized in equity as a covenant running with the land.³ But

¹ *Hurd v. Curtis*, 19 Pick. (Mass.) 459; *Black v. Isham*, 16 Am. Law Reg. (Ind.) 8; *Keppell v. Bailey*, 2 Myl. & K. 517; *Cole v. Hughes*, 54 N. Y. 444; *Todd v. Stokes*, 10 Penn. St. 155; *Davids v. Harris*, 9 id. 503; *Gilbert v.*

Drew, 10 id. 219; *Hart v. Kurcher*, 5 S. & R. (Penn.) 1.

² *List v. Hornbrook*, 2 W. Va. 346; *Lester v. Barron*, 40 Barb. (N. Y. S. C.) 297.

³ *Platt v. Eggleston*, 20 Ohio St. 414

where the covenant is under seal, and includes the heirs and assigns of the covenantor, it is held that this creates a liability in favor of the grantee of the covenantee, to contribute whenever he uses the wall.¹ But in any event, such a covenant is obligatory upon the parties thereto, and binds either party to pay to the other one-half the expense of the wall when put to a beneficial use.²

SEC. 227. But in some of the States, particularly in the large cities of the country, the rights and liabilities of parties in reference to party walls is regulated by statute. This is the case in Pennsylvania, Iowa, in the cities of New York and Brooklyn, and in the District of Columbia, and in many other of the large cities. In the case of *Miller v. Elliott*, 5 Cranch (C. C. U. S.), 543, decided in 1839, the court held that assumpsit could be maintained by an adjacent lot owner against his neighbor for one-half the expense of building a party wall between their lots. That the action could be upheld by the implied promise which arises from the fact that there is, by law, a condition annexed to the title of every house lot in the city of Washington, that where any lot owner builds a partition wall between himself and his neighbor, he shall lay one-half of it upon his neighbor's land, and that when the neighbor uses the wall, he shall pay to the first builder a moiety of the expense of such part as he shall use.³

SEC. 228. Having ascertained what constitutes a party wall, it now becomes important to ascertain what interest each owner has in the wall, how each may use it, and what rights and liabilities exist in relation thereto.

¹ *Brown v. Pentz*, Ct. of App., 11 N. Y. Leg. Obs. 24; *Burlock v. Peck*, 2 Duer (N. Y. S. C.), 90; *Maine v. Cumston*, 98 Mass. 317.

² *Keteltas v. Penfield*, 4 E. D. Smith (C. P. N. Y.), 122; *Wegman v. Ringold*, 1 Bradf. (N. Y.) 52; *Gills v. Dogro*, 1 Duer (N. Y. Sup. Ct.), 331; *Thompson v. Curtis*, 28 Iowa, 232; *Floramer v. Mailtott*, 22 id. 114; *Mason's Appeal*, 70 Penn. St. 76; *Cutter v. Wilson*, 3 Allen (Mass.), 196; *Rill v. Roberts*, 24 Wis. 461; *Burton v. Moffatt*, 3

Oregon, 29; *Wickersham v. Orr*, 9 Iowa, 253; *Costa v. Whitehead*, 20 La. An. 341; *Auch v. Labouisse*, 20 id. 553; *Hunt v. Harris*, 19 C. B. (N. S.) 13.

³ *Cutter v. Wilson*, 3 Allen (Mass.), 196; *Wickersham v. Orr*, 9 Iowa, 253; *Rice v. Roberts*, 24 Wis. 461; *Mason's Appeal*, 70 Penn. St. 76; *Platt v. Eggleston*, 20 Ohio St. 414; *Burton v. Moffatt*, 3 Oregon, 29; *Floramer v. Mailtott*, 22 Iowa, 114; *Thompson v. Curtis*, 28 id. 227.

The interest of each party in the party wall is both joint and several; several to the extent that they are not tenants in common of the wall, but each severally owns his part thereof, and joint to the extent of the easement of support which each is entitled to for the walls and building of the other, so long as they are capable of yielding this support.¹ In the case of *Brooks v. Curtis*, this question of interest in a party wall came before the court, and upon this point, RAPALLO, J., said: "Although land covered by a party wall remains the several property of the owner of each half, yet the title of each owner is qualified by the easement to which the other is entitled." In *Partridge v. Gilbert*,² DENIO, J., in defining the interest of adjoining owners in a party wall, says: "Each had a title to the soil to the division line, which was the center of the wall or arch; but this title was qualified by the easement which each owner had of supporting his buildings by the common wall."

In *Brown v. Pentz*,³ McCOUN, J., said: "Such a wall standing partly on the land of the other does not, it is true, constitute a tenancy in common between them, because each owns in severalty to the dividing line of their respective lots, and, therefore, each of the house owners has a separate property in a moiety of the party wall, and an easement for the support of his house in the other moiety."

There is no question but that the parties may, by the terms of their respective grants, be made tenants in common of the wall; but such a condition of things will rarely arise in practice.

SEC. 229. Having ascertained the interest of each party in the wall, it is now important to know how long the easement endures. It is laid down in many of the modern cases that the easement of support from party walls exists so long as the wall remains in a

¹ *Brooks v. Curtis*, 50 N. Y. 639; *Sauer v. Monroe*, 20 Penn. St. 219; *Watts v. Hawkins*, 6 Taunt. 20; *Dowling v. Hemings*, 20 Md. 179; *Marvin v. Johnson*, 31 Iowa, 46; *Greenwald v. Kappes*, 31 Md. 216.

² *Partridge v. Gilbert*, 15 N. Y. 601; *Price v. McConnell*, 27 Ill. 255; *Duncan v. Hanbert*, 2 Brewster (Penn.), 362; *Greenwald v. Kappes*, 31 Md. 216; *Ridgway v. Vose*, 3 Allen (Mass.), 180; *Brown v. Pentz*, Ct. of App., 2 N. Y. Leg. Obs. 24; See, also, *Eno v. Del Vecchio*, 4 Duer (N. Y.), 53; *Bradbee v. Christ's Hospital*, 4 M. & G. 714; *Cahitt v. Porter*, 8 B. & C. 257; *Sherred v. Cisco*, 4 Sandf. (N. Y.) 480; *Glen v. Davis*, 35 Md. 208; 6 Am. Rep. 389.

sound condition and capable of safely bearing the burdens imposed ; but that where it falls into decay, and becomes ruinous or unsafe, the easement is ended and the parties are remitted to their original rights the same as though no party wall had existed.¹ But this depends very much upon the circumstances and conditions under which the right was acquired. If the easement is acquired by grant, the language of the grant and the evident intention of the grantor must control its duration. If by statute, the provisions of the statute control it, and if by prescription the user and its incidents. The wall may become ruinous and useless, and beyond the reach of repair, but the question behind that is, what interest, if any, is left in either party in the other's soil for the purposes of support for a new wall in case either should desire to rebuild it. In other words, when the wall ceases to serve a useful purpose, has either owner a right to replace it with a new wall upon the old site without the consent of the other ? There are no cases that seem directly to decide this question.

SEC. 230. In *Campbell v. Messier*, 4 Johns. Ch. (N.Y.) 334, the question came up as to the right of a party rebuilding an ancient wall between two houses to compel the other owner to contribute toward the expense of the new wall, and the court held that the right could be enforced. It is time that in that case the old wall was taken down and a new one built upon the old site, but the other's house was left without support by the taking down of the wall, and the easement was actively employed in affording support to the building. The plaintiff having taken away the support was, perhaps, bound to restore it by another wall. However that may be, the question as to the plaintiff's right or duty in that respect was not raised or decided in the case. In fact, in that case the rebuilding of the wall was regarded more in the light of a repair than otherwise, and was undoubtedly so regarded under the circumstances of the case, one of the buildings still standing, and entitled to support from the common wall. The easement cannot be said to have been ended in that case, nor, indeed, can it be in any case, unless the decay and incapacity

¹ *Partridge v. Gilbert*, 15 N. Y. 601 ; 13 ; *Glen v. Davis*, 35 Md. 208 ; *Dowl-But see Hunt v. Harris*, 19 C. B. (N.S.) 179 ; *ing v. Hemings*, 20 id. 179.

of the wall is full and complete as to every part of the wall in which the easement exists. So long as it is in part useful, there can be no question but that either owner might, in a proper manner, restore the wall to its original efficiency by repairs, for the easement has not lapsed.¹ If, in that case, there had been no building on the adjoining lot, so that the easement was not actively employed by the other owner, a far different question would have been presented; but, from the general current of the authorities, I think the plaintiff in this case would *not* have had the right to rebuild the wall upon the old site, without the consent of the other owner. The easement acquired by prescription in such a case is not perpetual, and in the very nature of things could not be. It is simply a right or privilege to have the particular building supported by a wall resting in part upon the other's land. When the wall falls into decay and ceases to furnish support, and the building is taken down, the easement is at an end, and the parties are remitted to their original rights, and stand in the same position as though no building had ever been erected and no wall built.² In the language of DENIO, J., in *Partridge v. Gilbert*, 15 N. Y. 601, "I do not perceive any solid distinction between a total destruction of the wall and buildings, and a state of things which should require the whole to be built from the foundation. In either case there is great force in saying *that the mutual easements have become inapplicable*, and each proprietor may build as he pleases upon his own land *without any obligation to accommodate the other*."

SEC. 231. In *Sherred v. Cisco*, 4 Sandf. (N. Y. Sup. Ct.) 480, this question was somewhat considered by SANDFORD, J., and his remarks upon that point are entitled to great weight, as expressive of the opinion of a judge of large experience and eminent legal attainments. In that case the plaintiff and defendant were the owners of adjoining lots in the city of New York with a party wall between their buildings and used for their mutual support. The buildings and party wall were wholly destroyed by fire, and the

¹ *Partridge v. Gilbert*, 15 N. Y. 601; ² *Partridge v. Gilbert*, 15 N. Y. 601; *Eno v. Del Vecchio*, 4 Duer (N. Y.), 53; *Glen v. Davis*, 35 Md. 208; 6 Am. Rep. 389. *Dowling v. Hemmings*, 20 Md. 179.

plaintiff rebuilt the same upon the old site, and this suit was brought to compel him to contribute toward the expense of the wall. The court held that the defendant could not be compelled to contribute even though he had made use of the wall. In disposing of the question the judge said: "Suppose the defendant had said on being requested to join in the party wall, I bought this lot at a public sale without notice of any such right as you claim, and my recorded title shows nothing of this kind. Would not this have been a conclusive answer to this request? Suppose further, that on assuming to build the new party wall the defendant had forbid the plaintiff to put any part of it on her land, could he not have maintained trespass every day against her workmen while building it, and when completed, could he not by ejectment have compelled her to take it down? It seems to us that this question must be answered in the affirmative." The easement is ended by the destruction of the wall and buildings, and it cannot be replaced upon the old site, unless by grant or statute provision is made therefor, or the party by adverse user has acquired a prescriptive right to do so, which cannot be the case where the wall has been used by both parties. But where either building is left standing, needing support, it may be replaced and will be treated as a repair.¹ It will, of course, be understood that where a wall has been built partly upon the land of another, and is occupied by the builder alone, adversely for the statutory period, he acquires an absolute title to the land covered by the wall. A wall built under such circumstances is, in no sense, a party wall.

SEC. 232. The rights of parties in and their control over party walls have not been definitely settled by the courts of this country, but it may be said that each owner has a right to use the wall for the support of his buildings, in any manner that does not interfere with a like use by the other, and that does not injuriously affect the other. The use must be reasonable, and such

¹ *Brooks v. Curtis*, 50 N. Y. 640; *Penfold*, 4 E. D. Smith (N. Y. C. P.), 122; *Rogers v. Sinsheimer*, 50 N. Y. 646; *Brondage v. Warner*, 2 Hill (N. Y.), 145.
Huttemier v. Albro, 18 id. 48; *Partidge v. Gilbert*, 15 id. 601; *Fetteretch v. Leamey*, 9 Bosw. (N. Y.) 510; *Hendrick v. Starks*, 37 N. Y. 106; *Ketteltas*

as is consistent with the evident object, purpose and extent of the easement, and the question as to what is reasonable is to be determined from the capacity of the wall, the purpose for which it was built and its condition. The rights of the parties are mutual and are to be measured by their use and reasonable necessities, and any act of one party that injuriously affects the other is a nuisance, and actionable as such. Thus, when the wall is erected and buildings are erected upon both lots, neither party can interfere with the wall except at his peril. If he raises his side of the wall or pares it, or makes any changes therein, for his own convenience merely, no degree of care or skill observed by him will shield him from liability to the other owner, if his rights are impaired or his property injured thereby.¹ He may do what he can with the wall to serve his individual necessities, as to lower it, sink it, or raise it,² if he can do so without injury to the other, but if, from such use or interference by him, injury results to the other owner, he is liable absolutely for the consequences irrespective of the degree of care or skill exercised by him in the execution of the work. But when repairs in the wall are rendered necessary, or when the walls fall into a state of decay so that it becomes necessary to take them down and rebuild them, either party has a right to do so, upon reasonable notice to the other, using such care and skill in the prosecution of the work as the circumstances may require.³ If the wall has fallen into such a state of decay as to serve no useful end in affording support, he may take down the wall and replace it, or he may take it down and build entirely upon his own lot, as his taste, convenience, or necessity may dictate. Thus in *Partridge v. Gilbert*, it appeared that prior to the year 1794, Peter Stuyvesant owned the ground covered by both stores, which was a lot fifty-six feet on the north side of Courtland street and extending back the same width one hundred and thirty-eight feet. On this lot he had erected two brick dwelling-houses of equal dimensions, adjoining each other, between which there was a common wall, which is the wall in

¹ *Webster v. Stevens*, 5 Duer (N.Y.), 553; *Eno v. Del Vecchio*, 4 id. 53. *Dowling v. Hemmings*, 20 Md. 179; *Richards v. Rose*, 9 Exchq. 218; *Par-*

² *Eno v. Del Vecchio*, 4 Duer (N. Y.), 55. *dessus Traite des Servitudes*, 251, ed. 1829; *Crawshaw v. Sumner*, 56 Mo.

³ *Partridge v. Gilbert*, 15 N. Y. 601; 517.

question. The wall was erected upon the top of an arch extending from the street to the rear of the houses. It was of brick, fifteen feet high and four feet wide, and was made for the common use of the two dwellings, for the purpose of a passage from the street to the yard in the rear. In 1796, W. L. Smith was the owner of the whole of the premises by title derived from Stuyvesant, and on the sixth day of October, in that year, Smith conveyed to W. W. Burrows, the easterly half of the lot, being the premises occupied by the plaintiffs, describing it as "bounded on the west by another house and lot of the said W. L. Smith," and as containing "in breadth in front twenty-eight feet or more, and in the rear twenty-eight feet or more, and in length on each side one hundred and thirty-eight feet more or less, being one moiety or half part of the large lot of ground containing fifty-six feet or more in front and rear, and in length on each side one hundred and thirty-eight feet more or less, purchased, etc., of Peter Stuyvesant, together with all and singular the passages, etc., buildings, etc., ways, etc., basements, etc." Jacob Surget had become the owner of the lot by a title derived from W. L. Smith; and the plaintiffs had a lease from Surget for a term which would expire May 1, 1851. The defendants' title to lot number twenty was derived mediately from W. L. Smith, who, after conveying to Burrows as above mentioned, conveyed lot No. 20, or the west half of the original premises, to a person under whom the defendants derived their title. The deed of Smith described the premises conveyed as a house and lot, and after giving the other lines, as bounded on the east by "a house and lot of ground late the property of the said W. L. Smith, containing in front on Courtland street twenty-eight feet or more, and in length on both sides one hundred and thirty-eight feet or more, "together with all and singular, the house, passages, privileges, appurtenances," etc. In 1834 or 1835 the arched passage-way above mentioned was walled up at its entrance on the street. After some time the two buildings were changed from dwellings into stores. They were raised a story higher and new fronts were put in. The arch, which had cracked, was at the same time strengthened by a piece of timber placed under the crown, extending from the front to the rear of the buildings,

and which timber was supported by locust posts standing on the floor of the arched passage. These repairs and improvements were assumed to have been made by the mutual co-operation of the owners of both buildings.

On the 25th of January, 1850, the defendants gave the plaintiffs a notice in writing, informing them that on or before the first day of May then next, they (the defendants) should take down the wall between the two buildings for the purpose of erecting a new building on their own lot. Accordingly on the 1st day of May, the defendants commenced taking down their building and erecting a new one. They were delayed a few days by the operation of an injunction which the plaintiff had procured to be issued but which was dissolved. The new store of the defendants was nearly twice as deep as the old building. It was higher and the foundations and cellar were sunk much deeper. The old division wall was taken down and the new one was built in the same precise place. During the progress of the wall a temporary partition of boards was put up by plaintiff's landlord to protect as far as practicable the plaintiff's store and goods. The beams and floors of the plaintiff's store were supported by the new wall when built, as they had been by the old one. The new store was completed so as not farther to disturb the plaintiff, by about the first day of September. The next year the plaintiff's landlord, the owner of the lot number eighteen, put up a new store in the place of the old one, making use of the wall which the defendants had built. The evidence upon the trial, beyond establishing the foregoing facts, was directed principally to the question as to the condition of the arch and wall and the two stores; the defendants insisting and endeavoring to show that the arch and the wall were dilapidated and ruinous, and that the stores were in danger of falling down; and the plaintiffs controverting that position. It appeared that the plaintiffs had sustained damages on account of the dust, and the water which came in during showers, while the wall was going on, and from loss of custom, and also from being unable to let the upper lofts. It was to recover these damages that the action was brought. The plaintiffs occupied the main store of their building as dealers in paper hangings.

After the evidence was closed, Judge DUEK proposed to the jury the following questions: First. Whether the condition of the arch and party wall was so dangerous on the 1st of May, 1850, that a just regard to the safety of life and property rendered their removal necessary; Second. Whether the buildings were safe and fit for occupation as stores during the ensuing year; Third. Whether, conceding that the arch and walls would have sustained the buildings another year or longer, their condition was such that in the exercise of ordinary prudence it was expedient to remove them; Fourth. Whether the removal by the defendants of their portion of the wall and arch, which was on their own land, would have occasioned the destruction of the whole arch and wall; Fifth. Whether the same consequences would have followed if the defendants had removed only the front and rear walls of their building, together with the floors and beams; Sixth. What was the amount of the plaintiff's damages, considering the defendants' acts as wholly unlawful. Plaintiff's counsel objected to these propositions, especially to the first and third, which they insisted were irrelevant. They asked the judge, instead of the second question, to submit to the jury whether the wall was sufficient to support the plaintiff's store the residue of his lease, if it were occupied in the manner it had heretofore been, and also whether both stores would not have been tenantable that year, with proper precautions as to the business carried on. The judge overruled the objection and refused to modify the propositions as the plaintiffs desired, and their counsel excepted to the several rulings against them. Jury answered all of the first five questions favorably to the defendants, namely, all but the second in the affirmative and that in the negative. As to the sixth, they stated that the plaintiff's damages were \$703. Upon this finding the judge held that the defendants were justified in what they had done, and the judgment was affirmed by the court of appeals.

Thus it will be seen that the principal conditions upon which a party wall in actual use by both parties may be taken down are, that the wall has fallen into such a state of decay as to be so unsafe or useless as to render it inexpedient to longer employ it for the purposes of support.

SEC. 233. But this question is not to be determined wholly in accordance with the necessities of either owner. If the wall is intact and capable of yielding support to one owner, it cannot be taken down by the other, even though his building has been destroyed by fire, and every part thereof except this wall rendered utterly useless. The wall itself must have become unsafe or useless, or it cannot be interfered with to the injury of the other, and the owner of the lot upon which the building is destroyed, cannot maintain ejectment or any other action against the other owner for the ground covered by the wall, until the wall has become so insufficient, that the easement can be said to have ended.¹

The rule as laid down by BOSWORTH, J., in the case cited below,* was this: "When the owners of adjoining lots agree, although verbally, that each will erect a building or store on his own lot, and that the dividing wall shall be a party wall and be used to support the beams and roof of each building, and they build according to such agreement, and with a view to execute it, neither can remove or do any thing to impair the stability or efficiency of such wall, so long at least as the buildings continue to subserve, in every substantial respect, the uses for which they were erected."

SEC. 234. The height of the wall may be increased, and any changes made therein that the tastes or convenience of either owner may dictate, so long as the same can be done without injury to the other or detriment to the strength of the wall, *but the party making these changes does it at his peril*; he stands as an insurer to the other of the safety of the work, and against injurious results therefrom, and if injury does result he is liable for all the consequences.⁴ He may not pare off a portion of the wall upon his premises with a view to the erection of a new wall entirely upon his land, nor in any manner deal with the wall so as to diminish its efficiency or its strength.⁴

¹ Brondage v. Walker, 2 Hill (N. Y.), 145; Rogers v. Sinsheimer, 50 N. Y. 646; Evans v. Jayne, 23 Penn. St. 34.

² Maxwell v. The East River Bank, 3 Bosw. (N. Y.) 124; Potter v. White, 6 id. 644; Sherred v. Cisco, 4 Sandf. 480.

³ Brooks v. Curtis, 50 N. Y. 639; Eno

v. Del Vecchio, 4 Duer (N. Y.), 53; Moody v. Clelland, 39 Ala. 45; Marvin v. Judson, 31 Iowa, 46; McGittegan v. Evans, 8 Phila. 264.

⁴ Phillips v. Boardman, 4 Allen (Mass.), 147.

In Ohio¹ it was held in one case that, where parties had erected a party wall and used it as such for twenty-one years, either party has a right to take his half of the wall down if he desired to change the character of his building, even though the wall was in a sound condition, and that, after notice given to the other party of his intention, he would not be liable, even though the entire wall fell and injured the other's house; but this decision is in direct conflict with the law upon this subject, and cannot be regarded as entitled to weight as an authority.

CHAPTER SEVENTH.

HIGHWAYS — WHAT ARE ILLEGAL OBSTRUCTIONS OF.

- SEC. 235. What constitutes a highway at common law.
236. Highways by prescription.
237. Rights acquired by the public in a highway.
238. Conflict of doctrine as to relative rights of the public and the owner of the fee.
239. What constitutes a highway by dedication.
240. Presumption arising from an open user of a way.
241. Use of a way by the public, must be accompanied with such acquiescence by the owner of the fee as to establish an *animus dedicandi*.
242. Declarations of the owner will neither establish or defeat the right. Erection of houses leaving open space in front, evidence of dedication.
243. Question of fact for jury whether the use by the public or the acts of the public have been such as to establish dedication.
244. Dedication may be qualified by the owner of the fee.
245. In what respects dedication may be qualified.
246. Reservations must be exercised reasonably.
247. No limitations as to time can be imposed.
248. Use must be known to the owner. When it may be inferred.
249. To make a highway by dedication, public must accept it.
250. Obstruction of a highway is a public nuisance.
251. As to what use of a highway is a nuisance is a question for the jury.

¹ *Hiatt v. Morris*, 10 Ohio St. 532. But no action lies for removal of a building standing on a party wall, if no damage is done to the adjoining building or wall. *Major v. Park Lane Co.*, 2 L. R. (Eq. Ca.) 453. As to what constitutes an ouster, see *Stedman v. Smith*, 8 Ellis & B. 1.

- SEC. 253. Every actual encroachment on a highway is a nuisance.
253. When question of nuisance is one for the court.
254. Rule in *Harrower v. Ritson*.
255. Rule in *Rex v. Wright*.
256. Nuisances to highways as given by Hawkins and in various cases.
257. Doctrine of *Peckham v. Henderson* questioned.
258. Necessary obstructions not nuisances.
259. Use of highway must be reasonable. What uses are unreasonable.
260. Rule in *Rex v. Russell*.
261. Necessary uses of highway must not be unreasonable.
262. The public are entitled to all the land embraced within the limits of the highway.
263. Rule in *Rex v. Jones*.
264. Rule in *Rex v. Cross*.
265. Rule in *People v. Cunningham*.
266. Rule in *Rex v. Carlisle*. Loungers, nuisances.
267. Collection of crowds, a nuisance.
268. Unauthorized excavations, nuisances.
269. Cellar openings, excavations, fruit stands or any huckster stands.
270. Rule in *Coupland v. Hardringham*.
271. Landlord liable equally with tenant when premises are let with nuisance on them.
272. Rule in *Pretty v. Brickmore*.
273. Excavations near a highway nuisances, when.
274. Excavations made under proper authority.
275. Excavations made by authority must be properly guarded and every means adopted for protection of public.
276. Authority cannot be given to endanger public safety.
277. Erections near a highway must be so constructed as not to endanger safety of travelers. *Daniels v. Potter*.
278. Rule in *Vale v. Bliss*.
279. Insecure areas in public footways.
280. Rule in *Barnes v. Ward*.
281. Rule in *Chicago v. Robbins*.
282. Rule in *Congreve v. Smith*.
283. Interferences by owner of the fee.
284. Legislative authority restricted.
285. Railroad grants must be exercised in conformity to charter.
286. Restrictions upon railroads.
287. Restrictions upon all legislative grants.
288. Private ways.
289. Liability of owner of premises for defective way.
290. Changing grade of highway by individual.
291. Erections on premises adjoining highway that frighten horses
292. Same continued.
293. Obstructions near highway outside its limits not nuisances.

- SEC. 294. Obstructions by teams.
295. Objects calculated to injure traveler.
296. Shade trees.
297. Owner of fee may do nothing to impair safety of travel.
298. Stationing person on highway to injure business of another.
299. Once a highway always a highway until lawfully discontinued.
300. Drawing unreasonable loads over a highway.
301. Noxious trades near a highway.
302. Authorized obstructions.
303. Same continued.
304. Rule in *Moshier v. R. R. Co.*
305. Legislative grant authorizes all uses necessary to a proper exercise of the powers given.
306. Rule in *Rex v. Pease.*
307. So long as the authority is exercised reasonably, the grant is a protection.
308. Rule in *Turnpike Co. v. The Camden and Amboy R. R. Co.*
309. Defective highways a nuisance.
310. Liability for maintenance of highways in England.
311. When parishes escape liability.
312. When individuals or corporations are liable to repair.
313. Prescriptive liability to repair arises out of the tenure of the land.
314. Prescriptive liability only extends to the old way.
315. No liability for injuries resulting from non-repair.
316. Repairs of bridges in England is imposed on the county.
317. No common-law liability to repair in the United States.
318. Statutory powers and liabilities.
319. Unsafe highways or bridges, nuisances.
320. Distinction as to location.
321. As to what is a defect, is a mixed question of law and fact.
322. The obligation to repair imposed by law, is to keep the road in good repair.
323. No liability exists for defects until the road has been adopted.
324. No liability exists for injuries resulting from something outside the limits of the highway.
325. Rule in *Hixon v. Lowell.*
326. Rule in *Morse v. Richmond.*
327. No liability for injuries from going upon the margin of a highway unnecessarily.
328. Rule in *Alger v. Lowell.*
329. Duty of towns to define the limits of highways by erection of proper guards.
330. Towns cannot shift their liability upon individuals or corporations.
331. Liability when highways or bridges are destroyed by floods.
332. Duty to erect railings at dangerous points.
333. Relative duties as between travelers and the town.

SEC. 235. At common law a highway is any road or way, whether by land or water, over which any person has a lawful right to pass, and to use for all the purposes of travel to which it is adapted and devoted. It is a matter of no importance—although formerly it was otherwise—whether the way leads from one town to another, or whence it begins or where it ends.¹ The test by which to determine whether or not it is a highway is, whether it is used as, and is open and free to every one for the purposes of transit and passage, and is adopted and controlled by the proper authorities as such.² If it is, it is a highway, otherwise it is not. Neither is it a matter of any importance so far as the question of nuisance to a way is concerned, whether the way is public or private, except in determining when an obstruction is a public nuisance, and when only private. For while every actual obstruction of a highway is a public nuisance, and indictable and punishable as such, yet, no obstruction, however great, of a private way is any thing more than a private, actionable nuisance.³ In this country highways are acquired either by prescription or dedication, or by action of the proper authorities, by the methods provided by the statutes of the several States.⁴

SEC. 236. It has been claimed and so held in some cases that there can be no such thing as a highway by prescription. That inasmuch as a prescriptive right presupposes a grant, and inasmuch as the public cannot take by grant, therefore, strictly it has no application to a highway, but only to individual rights. There are numerous cases,⁵ however, in which a different doctrine has been held, but in point of fact it is a matter of little importance, as the same class and character of proof is usually required to establish a highway by prescription as by dedication,⁶ and in some of the States it is provided by statute that all roads which

¹ 1 Hawk. P. C., ch. 76, p. 31; *Rex v. Saintiff*, 6 Md. 255; *Allen v. Ormond*, 8 East, 4; *Rex v. Severn & Wye R.R. Co.*, 2 B. & A. 648; *Stackpole v. Healy*, 16 Mass. 33; *Peck v. Smith*, 1 Conn. 103; *Makepeace v. Worden*, 1 N. H. 16; *Rex v. Cumberworth*, 3 B. & Ad. 108.

² *State v. Trask*, 6 Vt. 355; *Cincinnati v. White*, 6 Pet. (U. S.) 435;

Noyes v. Ward, 19 Conn. 250; 3 Kent's Com. 32.

³ *Drake v. Rogers*, 3 Hill (N. Y.), 604.

⁴ *Post v. Pearsall*, 22 Wend. (N. Y.) 444; *Hart v. Trustees*, 15 Ind. 226; *Martin v. People*, 23 Ill. 395.

⁵ *Committee v. Case*, 26 Penn. 117; *Odiorne v. Wade*, 5 Pick. (Mass.) 421; *Reed v. Northfield*, 15 id. 94.

⁶ *Reed v. Northfield*, supra.

shall have been used as such for twenty years, and not recorded, shall be deemed public highways.¹

SEC. 237. In *Regina v. Saintiff*, 6 Mod. 255, it was said that the word "highway" is the genus of all public ways, and includes at once all streets in cities or villages, and all navigable streams. It is quite obvious, however, that there is a wide distinction between the streets in a city and highways in suburban districts, in their uses and incidents, owing to the fact that in rural districts the only use to which highways are devoted is for the ordinary purposes of travel, while in cities and villages there are a multitude of public uses to which the streets are necessarily devoted besides those of ordinary transit. At the common law, the only right which the public acquired in highways was that of passage over it, and any interference with the soil, other than that necessary to the full enjoyment of this right, including among its incidents the right of using the soil for the purpose of keeping the same in repair, is regarded as an interference with the rights of the owner of the fee, in whom the reversionary interest exists, and he can maintain an action therefor.² He has the right to the herbage growing thereon,³ to the timber, trees and stones upon the surface of the soil as against every one except the public, and against it, except so far as the same are necessary to keep the highway in proper condition.⁴ He also owns all the mines and quarries beneath the soil.⁵ But there is a wide distinction between the streets of a populous city and an ordinary country highway. When lands are dedicated to the use of the public for a highway, the dedication carries with it, by fair implication, all the rights and privileges that are necessarily incident to the highway in the locality in which it exists, or which may thereafter attach to it by reason of a change in the occupancy and use of property on its line by an extensive increase of population and change of interests.

¹ 1 R. S. N. Y., 3d ed., 636, § 120.

² *Lade v. Shepard*, 2 Str. 1004; *U. S. v. Harris*, 1 Sumn. (U. S.) 24; *Maynell v. Surtees*, 31 Eng. Law & Eq. 485; *Bingham v. Dean*, 9 Ham. (Ohio) 165; *Coake v. Green*, 11 Price, 736; *Chatham v. Brainard*, 11 Conn. 60; *Perley v. Chandler*, 6 Mass. 454; *Chamberlain v. En-*

field, 43 N. H. 365; *Jackson v. Hathaway*, 15 Johns. (N. Y.) 447; *Holden v. Shattuck*, Tr. 336.

³ *Goodhuth v. Alker*, 1 Bur. 133; *Rolle's Abr.* 392.

⁴ *Jackson v. Hathaway*, 15 Johns. (N. Y.) 447.

⁵ *Perley v. Chandler*, 6 Mass. 454.

This is also true of highways laid out by public authority. When land is taken for that purpose and damages appraised and paid therefor, the lands so taken become subject to all the servitudes incident to highways, not only in the condition in which the country through which it is laid then is, but subject also to all those additional servitudes that may necessarily be created by reason of the changes in the population and occupancy of the surrounding country. For it is fairly implied that a highway may be used for all the purposes that are incident thereto in any changes which may be effected by increase of population and the occupancy of property in its vicinity, and such as the legitimate wants and necessities of the public may require, and in the language of EDWARDS, J., in *Milbau v. Sharp*, 15 Barb. (N. Y. S. C.) 210, referring to this subject, "these uses have become not merely conducive to, but almost necessary for the health, prosperity and comfort of the public. They have been sanctioned by custom and approved by experience."

These streets have, for many years, been used for the construction of sewers, and for the laying of water and gas pipes, and no one has seriously questioned the right of the city to authorize their use for such purposes, and no adjoining owner, so far as I am aware, ever pretended to claim compensation for such use. These urban servitudes, as they have been called, are the necessary incidents of a street in a large city, and whether the streets be laid out and opened upon lands belonging to the corporation, or whether they become public streets by dedication or by grant, or upon compensation being made to the owner of the fee, they have all the incidents attached to them that are necessary to their full enjoyment as streets. It is an elementary principle of the law that when a power, right or thing is granted, either to a natural or artificial person, all the incidents are granted that are necessary to the enjoyment of the power, right or thing. And whether the corporation be the owner of the fee of the streets in trust for the public, or whether it be merely the trustee of the streets and highways as such, irrespective of the title to the soil, it has power to authorize their appropriation to all such uses as are conducive to the public good, and do not interfere

¹ *People v. Law*, 34 B. 494.

with their full and unrestricted use as highways; and in doing so it is not obliged to confine itself to such uses as have already been permitted. As civilization advances, new uses may be found expedient." The doctrine of this case is boldly and clearly expressed, and although apparently a departure from the old rules applied to highways and streets, it is not so in principle nor in practice.¹ It is only a clear, concise and sensible statement of a principle that has long been recognized, but never before stated with such clearness and force.

SEC. 238. But there are many glaring inconsistencies in the doctrine of the multitude of cases both in the courts of this country and England in reference to the relative rights of the owners of the fee and the public over highways. It will, however, be of no practical importance in the discussion of the question to which this chapter is devoted, to pursue the investigation of these questions extensively. I have simply called attention to the matter in order that the reader may the better understand that which is to follow, and that no confusion may arise from what otherwise might be regarded as conflicting and inconsistent doctrine. Those having occasion to investigate these questions will find the law well defined in "Angell on Highways," "Thompson on Highways," "Woolrych on Ways," and other works especially devoted to this subject.

SEC. 239. As to what constitutes a dedication of a way to the public so as to constitute it a highway, it may be said, that when the owner of land permits the free and uninterrupted use of a

¹ *West v. Bancroft*, 32 Vt. 367; *Haight v. Keokuk*, 4 Iowa, 199; *Carr v. Northern Liberties*, 35 Penn. St. 324; *State v. New Brunswick*, 1 Vroom. (N. J.) 395; *Cove v. Hartford*, 28 Conn. 363; *Fisher v. Harrisburgh*, 2 Grant's Cases (Penn.), 324; *Kelsey v. King*, 32 Barb. (N.Y. S. C.) 410; *Drake v. Hud. R. R. Co.*, 7 id. 528; *Plant v. L. I. R. R. Co.*, 10 id. 26; *Adams v. R. & S. R. R. Co.*, 11 id. 414; *Chapman v. Albany & Schenectady Railroad Co.*, 10 id. 360; *British Coast Plate Manfg. v. Meredith*, 4 Tenn. 794; *Boulton v. Crowther*, 1 B. & C. 703; *Sutton v. Clark*, 6 Taunt.

34; *Dore v. Gray*, 2 Tenn. 358; *Callender v. Marsh*, 1 Pick. (Mass.) 417; *Radcliffe's Ex'rs v. Brooklyn*, 4 N. Y. 195; *O'Connor v. Pittsburgh*, 18 Penn. 187; *Taylor v. St. Louis*, 14 Miss. 20; *Gossler v. Georgetown*, 6 Wheat. (U. S.) 593; *Round v. Mumford*, 2 R. I. 154; *Benedict v. Goit*, 3 Barb. 449; *Plank Road Co. v. Case et al.*, 2 Ohio St. 419; *Corn v. Temple*, 14 Gray (Mass.), 69; *People v. Law*, 34 Barb. (N. Y.) 494; *Brooklyn Railroad Co. v. Coney Island Railroad Co.*, 35 id. 364; *People v. Kerr*, 37 id. 358; *Nulay v. R. R. Co.*, 26 Conn. 249.

way over his premises by the public for such a length of time as to warrant the presumption that he intended to dedicate it to the public, this is regarded as sufficient to prove the existence of a highway, whether the owner of the soil is known or not.¹

SEC. 240. This open use of a way by every one who chooses to use it, as of right, raises a fair presumption of a public right to do so, and is *prima facie* sufficient to establish that right, and the burden of proving the contrary rests upon him who seeks to defeat it, by showing such a state of facts as is inconsistent with the acquisition of such a right.²

SEC. 241. There must be such a user by the public, and such an acquiescence in the use by the owner of the soil as to establish an "*animus dedicandi*." The use by the public is only the evidence of this, or in other words, is only one of the methods by which it may be established, and one single act of interruption of this right by the owner of the soil, is of much more weight in defeating the right than many acts of enjoyment.³

SEC. 242. Mere declarations of the owner that he intends to dedicate the land for public use, or that by permitting its use by the public he does not intend to dedicate it to such use, is not sufficient either to establish or defeat the right. It is his *acts* that establish the right on the one hand or defeat it on the other.⁴ Therefore, while time may be an essential ingredient in establishing the right, yet, it is not always important, as the owner of the soil may do that which of itself instantly, and without any use by the public, fixes the right beyond revocation. Thus, if a person builds a block of houses opposite each other, opening into a public street, and sells the houses or lets them, then the

¹ Reg. v. Marsh, 12 B. 857; Dawes v. Hawkins, 8 C. B. N. S. 857.

² Reg. v. Petrie, 4 El. & Bl. 737.

³ Poole v. Haskinson, 11 M. & W. 830.

⁴ Surrey Canal Co. v. Hall, 1 N. R. (Sc.) 264; Barraclough v. Johnson, 8 Ad. & El. 105; Bissell v. N. Y. C. R. R. Co., 23 N. Y. 61; Poole v. Haskinson, 11 M. & W. 827; Morse v. Renne, 32 Vt.

600; Ragan v. McCoy, 29 Wis. 356; Jersey City v. Morris Canal Co., 1 Beasley (N. J.), 547; Morey v. Taylor, 19 Ill. 631; Gwynne v. Holman, 15 Ind. 201; Alves v. Henderson, 16 B. Monr. (Ky.) 131; San Francisco v. Scott, 4 Cal. 114; Wright v. Tucker, 3 Cush. (Mass.) 290; Macon v. Franklin, 12 Ga. 239.

land between the houses so opened as a street will at once become a highway,¹ and if accepted and used by them he has thereafter no power to revoke the dedication, and he is precluded from doing any act upon the space so laid open that is inconsistent with the public right therein. Upon the other hand, if a man builds houses on either side of his lands, leaving an open space between for a street, and which is a continuation of a public street, and sells or lets the houses, but keeps up and maintains at the point of connection with the public street, a gate, or any other muniment that is inconsistent with an intention to throw it open to free use by the public, or that shows an intention on his part in any measure to qualify the use, then the land devoted to the use by the houses will not become a highway, or a part of the street.² The single question is, whether the *acts* of the owner of the soil are such as to furnish evidence of an unqualified intention, on his part, to dedicate the land to the public, for the purpose of a highway, or only for the convenience and benefit of the persons occupying the premises thereon located.³

SEC. 243. Therefore, it is always a question of fact for the jury to find whether the user has been such on the part of the public, or the acts of the owner have been such as to amount to positive dedication to the public, or only as a mere license, or a qualified use.⁴

It should be stated here, and understood, that a man may dedicate his land to the public as a highway or street, qualified by certain rights reserved to himself, or to others, and that the public, if it accepts it, accepts it subject to those burdens.⁵ Thus in the case of the *Marquis of Stafford v. Coyney*, 7 B. & C. 257, it was held that a way might be dedicated to the use of the pub-

¹ Cases cited, note 4, *supra*; also *Woodyer v. Hodden*, 5 Taunt. 125; *Cincinnati v. White*, 6 Pet. (U. S.) 431.

² *Trustees of British Museum v. Tunis*, 5 C. & P. 465.

³ *Daniels v. People*, 21 Ill. 439; *Gould v. Glass*, 19 Barb. (N. Y. S. C.) 195; *Stevens v. Nashua*, 46 N. H. 192; *Marcy v. Taylor*, 19 Ill. 634; *Johnson v. Slayton*, 5 Harring. (Del.) 448; *Heywood v. Chisholm*, 11 Rich. (S. C.) 253;

Tegarden v. McBean, 33 Miss. 283; *Fulton v. Mehrenfeld*, 8 Ohio St. 440.

⁴ *Selby v. Crystal Pal. Dist. Gas Co.*, 31 Law J. (Ch.) 575.

⁵ *Le Neve v. Vestry of Mile End*, 8 El. & Bl. 1054; 27 L. J. Q. B. 208; *Dawes v. Hawkins*, 29 Law J. C. P. 343; *Moran v. Chamberlain*, 6 H. & N. 541; *Cornwall v. Met. Com. of Sewers*, 10 Exch. 771; *Fisher v. Prowse*, 31 Law J. Q. B. 213; *Irvin v. Fowler*, 5 Rob. (N. Y.) 482.

lie for all purposes except that of carrying coals, so that persons carrying coals might be prevented from passing over it.

SEC. 244. So the owner of the soil may, at the time when the land is dedicated, qualify its use with any burdens, or subject to any uses by himself or others that he chooses, not inconsistent with the public use, and, if the public accepts it, it takes it subject to those uses.¹

SEC. 245. He may qualify the right by reserving the right to deposit goods on the soil of the way.² To have door-steps, or cellar-flaps projecting into it.³ To plow and sow the land on either side of the way.⁴ To keep up a gate across it,⁵ and thus to impose any reasonable burden on the way that he chooses. But the public may rid itself of these burdens, by taking the land in the ordinary modes provided by statute. But if it accepts it subject to these reserved rights it is precluded from interfering with the exercise of these rights in a reasonable way by those in whom they are vested. A man cannot reserve the right to maintain a public nuisance that endangers the safety of those using the street. His reservation must be exercised in a way that is consistent with the use of the street for the purposes of public travel, and if he abuses it so as to endanger the safety of those passing over the street, he is liable for all consequences, as for a nuisance, both civilly and criminally.

SEC. 246. These reserved rights operating as obstructions must be exercised reasonably, and the obstructions not be increased, either by acts of omission or commission, so as to impair the safety or convenience of the way beyond the extent of the reserved rights. Thus the cellar-flaps, or doors, must not be left open, or unfastened, or in an unsafe or insecure condition, and in all things the rights thus reserved must be exercised with a reasonable view to the safety and convenience of the public.⁶

¹ *Moran v. Chamberlain*, 30 Law J. 213; *Robbins v. Jones*, 33 L. J. C. P. 1; *Exch.* 299; *Le Neve v. Mile End*, *Irvin v. Fowler* 5 Robt. (N. Y. Sup. Ct.) *Vestry of*, 8 El. & Bl. 1093; *Irvin v.* 482.
Fowler, 5 Rob. (N. Y.) 482.

² *Moran v. Chamberlain*, 30 Law J. *Exch.* 299; *Le Neve v. Mile End*, 8 El. & Bl. 1093.

⁴ *Arnold v. Blaker*, L. R., 4 Q. B. 433; *Mercer v. Woodgate*, L. R., 5 Q. B. 26.

⁵ *James v. Hayward*, Cro. Car. 184.

⁶ *Daniels v. Potter*, 4 C. & P. 262;

³ *Fisher v. Prowse*, 31 Law J. Q. B. *Harris v. Proctor*, id. 337.

SEC. 247. But, while the owner of the soil may impose certain restrictions upon the use of the way, he can impose no conditions or limitations as to time. If the land is dedicated at all it is practically dedicated in perpetuity.¹

SEC. 248. It is sometimes of importance to ascertain whether the owner of the soil knew that his lands were used for the purposes of a highway, for a mere tenant or lessee cannot do any act that is in derogation of the rights either of his landlord or of the reversioner, and his consent to or acquiescence in such use will not bind the owner of the fee.² But the knowledge and consent of the owner to such use may be inferred from an open notorious use for a great length of time, and from these his consent and acquiescence may be presumed.³

SEC. 249. In order to make the dedication effectual, it must be accepted, and this acceptance may be of the whole or a part only of the land dedicated.⁴ As to what acts on the part of the public are essential to constitute an acceptance in those States where no statute exists upon the subject, the decisions are not uniform. But the prevailing doctrine seems to be, that when the highway is adopted and repaired by the authorities having the power to accept or adopt it as such, that this is an acceptance,⁵ although it is otherwise in New York.⁶ In England, *user* by the public, without any act of adoption, is held sufficient. In Virginia, there can be no acceptance except by the county court in the county in which the road is located, and a record of it must be made before it becomes a highway.⁷

In New York there is a statute providing that all roads that have been used as highways by the public for twenty years shall be deemed public highways.⁸

¹ *Dawes v. Hawkins*, 29 Law. J. (C. P.) 343.

² *Harper v. Charlesworth*, 4 B. & C. 591; *Wood v. Veal*, 5 B. & Ad. 454.

³ *Davies v. Stephens*, 7 C. & P. 570.

⁴ *State v. Trask*, 6 Vr. 355; *Noyes v. Ward*, 19 Conn. 250; *Cincinnati v. White*, 6 Pet. (U. S.) 451; *Com v. Fiske*, 8 Met. (Mass.) 238; *Smith v. State*, 3 Zabr. (N. J.) 130; *State v. Nudd*, 3 Foster (N. H.), 327; *Cole v. Sprowl*, 35 Me. 611; *People v. Jones*, 6 Mich. 176.

⁵ *Holmes v. Jersey City*, 1 Beasley (N. J.), 297; *Hobbs v. Sewell*, 19 Pick. (Mass.) 405; *Bowers v. Suffolk Mfg. Co.*, 4 Cush. (Mass.) 332; *Moray v. Taylor*, 19 Ill. 634.

⁶ *Oswego v. Oswego Canal Co.*, 6 N. Y. 184; *Clements v. Village of West Troy*, 16 Barb. (N. Y. S. C.) 257.

⁷ *Kelley's Case*, 8 Gratt. (Va.) 632.

⁸ 3 Rev. Stat.

In Indiana it is held that there must be an acceptance by the town or city.¹ In Vermont,² New Hampshire,³ Maine,⁴ Connecticut,⁵ Rhode Island,⁶ Kentucky,⁷ Illinois,⁸ South Carolina,⁹ it has been held that mere public user is one of the modes in which acceptance by the proper authorities may be inferred. In the case of *Folsom v. Underhill*, 36 Vt. 580, the court held that "there must be an intent to dedicate manifested, and an acceptance by the town authorities."

But it will not be profitable, in the limited space which can be devoted to this subject in this work, to pursue this inquiry further. Sufficient has been stated to show what amounts to a dedication, and how the dedication may be qualified, and it will be an easy matter to determine whether, in a given case in any of the States, there has been such an acceptance by the proper authorities as creates a highway.

SEC. 250. Any unreasonable obstruction of a highway is a public nuisance, and indictable and punishable as such, and that even if no one is thereby obstructed.¹⁰ As to precisely what the extent of the obstruction must be in order to create a nuisance is not definitely settled by the cases. But it would seem that, strictly speaking, any encroachment upon any part of a highway, whether upon the traveled part thereof or on the sides, comes clearly within the idea of a nuisance. Every person has a right to go over or upon any part of a highway, and the fact that from notions of economy, or otherwise, the public authorities having the same in charge have not seen fit to work the whole of it, does not alter or change this right.¹¹ It may be possible and

¹ *Indianapolis v. McClure*, 2 Carter, 147.

² *Dodge v. Stacey*, 39 Vt. 560.

³ *Baker v. Clarke*, 4 N. H. 380.

⁴ *Cole v. Sprowl*, 35 Me. 161.

⁵ *Curtis v. Hoyt*, 19 Conn. 154.

⁶ *State v. Town of Richmond*, 1 R. I. 49.

⁷ *Regina v. Un. King Tel. Co.*, 31 Law J. 167; *Turner v. Ringwood Highway Board*, L. R., 9 Eq. Ca. 418; *Siddons v. Gardner*, 42 Me. 248; *Dimmock v. Sheffield*, 30 Conn. 127; *Seward v. Milford*, 21 Wis. 485; *Shepardson v. Colerain*, 13 Metc. (Mass.) 56; *Morse v. Richmond*, 41 Vt. 435.

⁸ *Sparhawk v. Salem*, 1 Allen (Mass.), 30; *Cott v. Standish*, 44 Me. 198; *Wiley v. Portsmouth*, 35 N. H. 303.

⁹ *Rex v. Neil*, 2 Car. & Payne, 485.

¹⁰ *People v. Cunningham*, 1 Denio (N. Y.), 524; *Rex v. Russell*, 6 East, 427.

¹¹ In *Com. v. King*, 13 Metc. (Mass.) 115, it was held no defense to an indictment for a nuisance by placing obstructions in a highway that they were placed outside the traveled path where there were ledges and which cannot be used for travel. The court say: "Individuals only require a road of proper width and repair. But the town to enable it to discharge its

doubtless is the law, that the public would not be liable for injuries incurred by a traveler, who unnecessarily drove out of the beaten track of a highway, and followed his own inclinations in traveling there, but if he chooses to go there he has a perfect right to do so at his own risk, and any obstacle placed in the way of his doing so, is clearly an infringement and obstruction of a public right, and an annoyance such as brings it within the idea of this class of wrongs.¹ It must, however, be of such a character and kind as to operate as an obstruction to public travel or to public rights, or as to endanger the safety of persons traveling there,² or as to offend and annoy those who come in contact with it.³

SEC. 251. Highways are intended for, and devoted to, the purposes of public travel, and every person may exercise this right reasonably. But every unreasonable use of the same, whereby others are hindered, delayed or annoyed in a like reasonable use of the same, or in the rights incident thereto, is a nuisance.⁴ But whether a particular use, that is not a nuisance *per se*, is an unreasonable use and a nuisance, is a question of fact, to be judged of from the circumstances of each case by the jury.⁵

SEC. 252. Every actual encroachment upon a highway by the erection of a fence, or building thereon, or any other permanent or habitual obstruction thereof, may fairly be said to be a nuisance, even though it does not operate as an actual obstruction of public travel. It is an encroachment upon a public right, and as such is clearly a purpresture and a nuisance. The public is

* duties to the public, requires the full and entire width of the whole located highway." *Harlow v. The State*, 1 Iowa, 437; *Wetmore v. Tracy*, 14 Wend. (N. Y.) 250; *Wright v. Saunders*, 65 Barb. (N. Y. S. C.) 254.
¹ *Harrower v. Ritson*, 37 Barb. (N. Y. S. C.) 301; *Davis v. Mayor*, etc., 14 N. Y. 506; *People v. Vanderbilt*, 28 id. 396; *People v. Cunningham*, 1 Denio, 524; *Chamberlin v. Enfield*, 43 N. H. 356; but see *Griffith v. McCullum*, 46 Barb. 561, where a different doctrine is held but which is in conflict with the cases involving similar questions both in the supreme court and court of appeals of the State of New York, and which is

not upon this point entitled to weight as an authority.

² *Dover v. Fox*, 9 B. Monr. 201.

³ *Manly v. Gibson*, 13 Ill. 308.

⁴ *State v. Carver*, 5 Strobb. (S. C.) 217; *Columbus v. Jaques*, 30 Ga. 506; *Gerish v. Brown*, 51 Me. 256.

⁵ *Wetmore v. Tracy*, 14 Wend. (N. Y.) 250; *Com. v. King*, 13 Metc. (Mass.) 115; *Harlow v. State*, 1 Iowa, 439; *Angell on Highways*, 266; *Lodie v. Arnold*, 1 Salk. 168; *Harrower v. Ritson*, 37 Barb. (N. Y. S. C.) 301; 1 Hawk. P. C. 76, §§ 48-60; *James v. Hayward*, Cro. Car. 184; *Rogers v. Rogers*, 14 Wend. N. Y. 131.

entitled to the full and free use of all the territory embraced within a highway, in its full length and breadth, not only for the purpose of public travel, but also for all the purposes that are legitimately incident thereto, such as the laying of drains therein, taking the soil and trees thereon growing, for the purposes of repair, and the doing of any act conducive to the public health, comfort or necessity, that does not diminish or impair the transit thereover.¹ So, every individual member of the public has a right to travel over any part of the land embraced within the limits of a highway, whether the same is worked or ordinarily used for that purpose or not, and as any encroachment thereon interferes as well with the rights of the public politically as with the rights of the members thereof individually, it is a nuisance, and it is no defense that the encroachment is really for the benefit of the public.² Thus, in the case of *People v. Vanderbilt*, decided in the court of appeals of the State of New York and reported in 28 N. Y. 396, which was an action upon the equity side of the court to restrain the enlargement of a crib or pier in the North river, it was insisted by the defendant that the erection would not interfere with navigation, and consequently would not be a nuisance, but *EMMOTT*,

¹ *Gregory v. Commonwealth*, 2 Dana (Ky.), 417; *Stetson v. Faxon*, 19 Pick. (Mass.) 147; *Barker v. Com.* 19 Penn. St. 412; *Rex v. Wright*, 3 B. & Ad. 681. In *Harlow v. State*, 1 Iowa, 439, it was held that an indictment would lie for obstructing a road established by relocation, even though it has never been used as a road. *Reg. v. Un. King. Tel. Co.*, 31 Law J. M. C. 167; *Turner v. Ringwood Highway Board*, L. R., 9 Eq. Ca. 418; *Addison on Torts*, 225; *Lancaster Turnpike Co. v. Rogers*, 2 Barr. (Penn.) 114; *Ring v. Shoneberger*, 2 Watts (Penn.), 23; *Westmore v. Tracey*, 14 Wend. (N.Y.) 250; *Gunter v. Geary*, 1 Cal. 462; *Dimmett v. Eskridge*, 6 Munf. (Va.) 308; *Com. v. King*, 13 Metc. (Mass.) 115; *Dickey v. Maine Tel. Co.*, 46 Me. 483; *Harrower v. Ritson*, 37 Barb. (N. Y. S. C.) 301; *Wright v. Saunders*, 65 id. 254; *Calender v. Marsh*, 1 Pick. (Mass.) 417; *Radeliffe v. Mayor*, 4 N. Y. 195; *Snyder v. Rockport*, 6 Ind. 237; *Gassler v. Georgetown*, 6 Wheat. (U. S.)

593; but see *Baker v. Shephard*, 24 N. H. 231, where it was held that the public had no right to take trees growing on the highway even for purposes of repair. But it is evident from the authority cited by the court that it mistook the distinction between the taking of the trees and soil for the necessary purposes of repair, and the taking of them for other purposes.

The erection of a building in a street, for a market, jail, etc., held to be a nuisance, and its continuance was restrained. *Sutterloh v. Mayor, etc.*, of Cedar Keys, 15 Fla. 306.

2. In England it is held to be enough that the fence stands in the way of any person who may wish to go there. *Reg. v. Un. King. Tel. Co.*, 31 Law J. M. C. 167; *Turner v. Ringwood High. Board*, L. R., 9 Eq. Cas. 418; *Rex v. Wright*, 3 B. & Ad. 683; *Reg. v. Train*, 31 Law J. M. C. 169; *Rex v. Tindall*, 6 Ad. & E. 143; *Rex v. Ward*, 4 id. 460; *Com. v. King*, 13 Metc. 115; *Stephani v. Brown*, 50 Ill. 428; *Dickey v. Maine Tel. Co.*, 36 Me. 483; *Com. v. Ruggles*, 6 Allen (Mass.), 588; *Morse v. Richmond*, 41 Vt. 435; *Wright v. Saunders*, 65 Barb. (N. Y. S. C.) 254; *Morton v. Moore*, 5 Gray (Mass.), 573.

Fence in highway is a public nuisance, if it in anywise obstructs public travel. *Neff v. Paddock*, 26 Wis. 546.

J., in delivering the opinion of the court, laid down the rule thus: "The defendant cannot avoid liability for what he did and intended to do, on the ground that the proof does not show that the people sustained or would sustain any actual damages by the crib or proposed pier," and he refers to the case of *Rev v. Ward*, 4 Ad. & E. 384, and says: "It was held in that case on a trial of an indictment for a nuisance in a navigable river and common king's highway, that the finding of a jury that the embankment was a nuisance, but that the inconvenience was counterbalanced by the public benefit arising from the alteration, amounts to a verdict of guilty," and he announces the doctrine of the case in hand thus: "The crib sank by the defendant and proposed pier are a purpresture and *per se* a public nuisance. The offer, therefore, of the defendant's counsel to prove, by the testimony of witnesses, that the crib and proposed pier were not and could not be an actual nuisance, and would not injuriously interfere with or affect the navigation of the river or bay was properly overruled." This case is a full authority to sustain the doctrine that any encroachment upon a highway that interferes with public rights to the extent of amounting to a purpresture is *per se* a nuisance whether it operates to interfere with the ordinary transit over it or not.

SEC. 253. So in the case of *The State v. Woodward*, 23 Vt. 92, which was an indictment against the defendant for making an erection upon lands dedicated to the use of the public for a highway, the court held that such an appropriation of the land was *per se* a nuisance, and refused to submit the question to the jury to say whether the erection was a nuisance.

So in the case of *State v. Atkinson*, 28 Vt. 448, the question again arose before the same court, and it was held that, "when the fee of land is vested either in a town or individual, yet, if the actual use and occupation are in the public as a highway or common, any obstruction of it is a nuisance, for which the person making it is indictable."

SEC. 254. In the case of *Harrower v. Ritson*, 36 Barb. (S. C. N. Y.) 303, ALLEN, J., in a masterly opinion, whose doctrine has since in several instances been re-affirmed, in the same court lays

down the rule thus: "The fence was undoubtedly an encroachment upon the highway. It was also a public nuisance, and indictable as such. 4 Bl. Com. 167. And had the plaintiffs been indicted for erecting the nuisance the charge of the judge would have been strictly correct. It would have constituted no defense that travel was not entirely obstructed or hindered. The public have the right to the entire width of the road, a right of passage in the road to its utmost extent, unobstructed by any impediment," When it is remembered that the judge at the circuit instructed the jury that the fence amounted to an obstruction if it was within the actual limits of the highway, and that the plaintiff had no right to narrow the road; the statement of the court that the charge would have been correct if made in a case where the plaintiff was indicted for the obstruction, is a full adoption of the principle that any encroachment upon a highway is a nuisance.

SEC. 255. In the case of *The King v. Wright*, 3 B. & Ad. 681, which was an indictment for encroaching upon a highway, the same doctrine was held, and Lord TENTERDEN, C. J., in King's Bench, said: "I am strongly of opinion when I see a space of fifty or sixty feet through which a road passes, between inclosures, set out under an act of parliament, that, unless the contrary be shown, the public are entitled to the whole of that space, although from motives of economy, perhaps, the whole of it has not been kept in repair. If it were once held that only the middle part which carriages ordinarily run upon was the road, you might by degrees inclose up to it, so that there would not be room left for two carriages to pass.¹ The space at the sides is also necessary to afford the benefit of air and sun." In *Rex v. Lord Grovernor*, 2 Stark. 511, as well as in *Queen v. Betts*, 16 Q. B. 1022, it was held that "any permanent or habitual obstruction in a public street or highway is an indictable nuisance, although there be room enough left for carriages to pass."¹

¹ See, also, the following cases to the same effect: *Chamberlain v. Enfield*, 43 N.H. 356; *Rex v. Russell*, 6 East, 427; *People v. Cunningham*, 1 Denio (N. Y.), 542; *Davis v. Mayor*, 14 N. Y. 524; *Rex v. Cross*, 3 Camp. 226; *Rex v. Jones*, id.

230; *City of Rochester v. Erickson*, 46 Barb. (S. C. N. Y.) 92; *Purcell v. Potter*, Anthon's N. P. R. (N. Y.) 310; *Dickey v. Me. Tel. Co.*, 46 Me. 483; *Wright v. Saunders*, 65 Barb. (N. Y. S. C.) 214, in which it was held that the defendant

SEC. 256. In *Wetmore v. Tracy*, 14 Wend. 250, NELSON, J., says: "Encroachments upon highways are pronounced nuisances at common law, and abatable as such." 2 Burns' Just. 503; 2 Hawk. 408, §§ 61, 62. Hawkins in vol. 1, p. 408 of his Pleas of the Crown, says: "It seemeth that an heir may be indicted for continuing an encroachment or other nuisance to a highway begun by his ancestor, because such a continuance thereof amounts, in the judgment of the law, to a new nuisance." It will be seen by this that the author speaks of encroachments upon a highway as a positive nuisance, and all the early cases sustain this position, as well as all the modern cases that are well considered, and decided upon principle. In the same volume above referred to, on page 404, the writer says: "As to the first point, there is no doubt but that all injuries whatsoever to any highway, as by digging a ditch or making a hedge over thwart it, or laying logs of timber in it, or by doing any other act, which will render it less commodious to the King's people, are public nuisances at common law." In the succeeding section he adds: "Also, it seemeth to be clear, that it is no excuse, for one who layeth logs in the highway, that he laid them only here and there, so that people might have a passage by windings and turnings through the logs." It is not enough that a passage is left for carriages, the way must not be interfered with by individuals in such a way that by any possibility it may interfere with public convenience or public rights. In *Regina v. The Un. King Telegraph Co.*, 31 Law J. M. C. 167, it was held "that the public have the right to the use of the whole of the highway, and are not confined to that part of it which is metaled or kept in order for the more convenient use of carriages and passengers," and it was held that the respondents, by placing posts to hold their wires on the outer edge of the highway, were guilty of a nuisance. "It is enough," say the court, "that the posts stand in the way of those who may choose to go there."¹

was liable to the plaintiff for injuries sustained by him by reason of falling into a post-hole dug by the defendant on the extreme limit of a highway, and at a point which, by reason of natural obstructions, was not susceptible of use for the purpose of public travel. The court expressly holding

that a person had a right to travel on any part of a highway. *Com. v. King*, 13 Met. (Mass.) 115; *Howard v. The Inhabitants of N. Bridgewater*, 16 Pick. (Mass.) 189.

¹ See, also, *Rex v. Wright*, 3 B. & Ad. 683; *Turner v. Ringwood Highway Board*, L. R., 9 Eq. Ca. 418; *Regina v*

The same rule was announced in the case of *Davis v. The Mayor, etc.*, 14 N. Y. 524; and it may be regarded as the settled rule both in this country and England that permanent or habitual encroachments or obstructions upon highways are public nuisances.

SEC. 257. There are cases in apparent conflict with this doctrine, but, upon examination, it will be found that the questions arose in private actions against individuals who of their own motion removed such obstructions, when they did not operate as an impediment or obstruction to them, and consequently were not nuisances such as would justify individuals in abating. The courts have made a distinction between nuisances upon highways that affected the individual members of the public, and those that affected public rights purely, and it is in maintaining this distinction that this apparent conflict arises. This distinction was well defined in the case of *Harrower v. Ritson, supra*. In *Peckham v. Henderson*, 27 Barb. (S. C. N. Y.) 207, it was held that, "where a road was laid out six rods wide, but is fenced only four rods, and is thus used for thirty years without evidence of annoyance or inconvenience, such fence will not be such a public nuisance as will justify the commissioners of highways in abating it by removal." But where the people assert their rights through the proper channels against such encroachments, as by indictment or information in equity, the rule is otherwise. This case is in conflict with the settled doctrine of all well-considered cases not only in New York but elsewhere, and since the case of *Harrower v. Ritson, ante*, is certainly no authority in that State.¹

SEC. 258. So, too, because building is necessary, stones, brick, sand and other materials may be placed in the street, provided it be done in the most convenient manner.² So a merchant may

Train, 31 Law J. M. C. 169; *Rex v. Ward*, 4 Ad. & E. 460; *Rex v. Tindall*, 6 id. 143; *Higinbotham v. East & Cont. Steam Packet Co.*, 8 C. B. 337; *Com. v. King*, 12 Met. (Mass.) 115; *Rex v. Morris*, 1 B. & Ad. 441; *Harrow v. The State*, 1 Iowa, 489; *Dickey v. Tilbo*, 4 Me. 483; *Knox v. Mayor*, 55 Barb. (N. Y. S. C.) 254; *Osborn v. Ferry Co.*, 53 id. 627; *People v. N. Y. & H.*

R. R. Co., 45 id. 274; *Wendell v. Troy*, 39 id. 581; *Milhau v. Sharp*, 28 Barb. (N. Y. S. C.) 228.

1. *Dickey v. Maine Tel. Co.*, 46 Me. 483. The proper officers may abate any nuisance obstructing a highway. *Hubbell v. Goodrich*, 37 Wis. 84. And it is their duty to abate it. *Cook v. Harris*, 61 N. Y. 448.

2. *Vanderpool v. Hudson*, 28 Barb. (N. Y. S. C.) 196; *Jackson v. Schmidt*, 14 La. Ann. 806; *Haight v. Keokuk*, 4 Iowa, 199; *Cushing v. Adams*, 18 Pick. (Mass.) 110.

have his goods placed in the street for the purpose of having them removed to his store in a reasonable time, but he has no right to keep them there for the purposes of sale. So, when a person leaves wood or other goods in the street, on account of the breaking down of his wagon on which he was drawing it, he should remove it without unnecessary delay or it will become a nuisance, although he may leave it there a reasonable time.¹

Indeed, it may be stated generally as the law, that any temporary use of a highway or street that is rendered absolutely necessary from the necessities of trade, or erection of buildings that does not unnecessarily or unreasonably obstruct the same, is lawful; so, too, a temporary obstruction that arises from accidental causes does not render a person liable for a nuisance, provided that in all these instances no unreasonable or unnecessary delay is permitted.²

But it must not be understood that even for the purposes of business, whether in the erection of buildings, the loading and unloading of goods, or from any cause whatever, any unreasonable use of the highway can be justified.³

USES OF HIGHWAYS THAT ARE UNREASONABLE.

SEC. 259. A person using a highway for the purposes of travel must do so in such a way as not to unnecessarily or unreasonably impede the exercise of the same right by others, and if he does not exercise this right reasonably he is guilty of a nuisance.⁴

Thus a person has no right to stop his team in the highway, and allow it to remain there to the hindrance of others. Neither has he a right to deposit goods from his wagons upon a highway or street, and allow them to remain there unreasonably; neither has he a right to suffer goods, or his wagons, to remain there for more than a reasonable time, in case of accident by which his

¹ *Passmore v. Williams*, 1 S. & R. (Penn.) 219; *People v. Cunningham*, 1 Denio (N. Y.), 524; *Rex v. Watts*, 2 Esp. 675; *Harnwood v. Pearson*, 1 Camp. 515; *Congreve v. Smith*, 18 N. Y. 79; *Congreve v. Morgan*, id. 84; *Northrop v. Burrows*, 10 Abb. (N. Y.) 365; *Wood v. Mears*, 12 Ind. 515.

² *Northrop v. Burrows*, 10 Abt. (N. Y.) 365.

³ *Clark v. Fry*, 8 Ohio St. 358; *Bush v. Steinman*, 1 Bos. & Pul. 407; *Palmer v. Silverthorn*, 32 Penn. St. 65.

⁴ *Rex v. Cross*, 3 Camp. 226; *Rex v. Russell*, 6 East, 427; *Rex v. Jones*, 3 Camp. 280; *Burdick v. Worrall*, 4 Barb. (N. Y. S. C.) 596.

wagon is broken, or his goods thrown there, and a reasonable time is such time as is required in the ordinary course of business to remove them.¹ Neither has a merchant or trader, or manufacturer, or any person, no matter how great the necessity of his business, any right to use any part of the highway for the deposit, exhibition or sale of his goods. Neither has he a right to conduct his business in such a way as to keep goods constantly standing on the walk, or teams constantly, or for any considerable portion of the time employed in front of his premises engaged in loading or unloading goods, and the fact that the same is necessary, in the course of his business, is no excuse; it is his duty to carry on his trade where he will produce no serious annoyance to the people, as public convenience and necessity are paramount to the ends of trade or individual necessity.²

SEC. 260. Thus is the case of *Rex v. Russell*, 6 East, 427, which was an indictment against the defendant, who was a wagoner, for obstructing the streets with his wagons and goods, it appeared that the defendant was engaged in the transportation of goods to and from Exeter, and owned and used in his business a large number of wagons, and that often one, and sometimes three, were for several hours allowed to stand in the street before his warehouse, and frequently occupied one-half of the street, so that no carriage could pass on that side of the street, although two carriages could pass on the other side. That the wagons were loaded and unloaded in the street, and the packages thrown down on the same side of the street, so as frequently, with the wagons, to obstruct even foot passengers, and compel them to cross to the other side of the street.

The defendant insisted that partial obstructions of the street, which arose out of the necessary mode of carrying on business in a populous city having narrow streets, and the access to houses necessarily confined, did not constitute a nuisance, the passage not being impeded, but only narrowed.

¹ *Commonwealth v. Passmore*, 1 S. & R. (Penn.) 219; *St. John v. Mayor*, etc., 6 Duer (N. Y.), 315; *Wood v. Wear*, 12 Ind. 515; *Gahager v. R. R. Co.*, 1 Allen (Mass.), 187; *Bush v. Steinman*, 1 B. & P. 407.

² *Com. v. Passmore*, 1 S. & R. (Penn.) 219; *St. John v. Mayor*, etc., 6 Duer (N. Y. Sup. Ct.), 315; *Wood v. Mears*, 12 Ind. 515.

That the same thing necessarily happened in the carriage of goods to and from every tradesman's shop in a street. That the scaffolds erected in the streets, before houses under repair, stood upon the same plea of necessity, though the passage was thereby greatly obstructed for the time. The court says: "It should be fully understood that the defendant cannot lawfully carry on any part of his business in the public street to the annoyance of the public; the primary object of a street is free passage for the public, and any thing which impedes that free passage is a nuisance. If the nature of the defendant's business is such as to require the loading and unloading of so many more of his wagons than can conveniently be contained within his own premises, he must either enlarge his premises, or remove his business to some other more convenient locality."

SEC. 261. Thus it will be seen that while necessity, such as the erection of buildings, the loading and unloading of goods, the setting down and taking in of passengers from or to a coach, etc., will excuse a temporary obstruction of a highway, that nevertheless the right must be exercised reasonably, and that no man has a right for any purpose to persist in keeping up a continuous blockade of a part of the street, either under the plea of necessity or otherwise, for public rights and the public convenience are paramount to the necessities of trade or individual convenience.

SEC. 262. The public are not only entitled to a free passage along the street, but are entitled to a free passage over any portion of it that they may choose to take, and no person has a right unreasonably or unnecessarily to impair that right. The right to load and unload carriages in a highway is one of the rights incident to it, but it is entirely subordinate to the right of passage, and must be so exercised as not unreasonably to abridge or impair this superior right.¹

SEC. 263. In *Rex v. Jones*, 3 Camp. 230, the doctrine as to the rights of parties to the use of highways from necessity was laid

¹ *Thorpe v. Brumfitt*, 8 L. R. (Eq. Ca.) 650.

down by Lord ELLENBOROUGH quite distinctly in accordance with the general statements in section 259, *ante*. This was an indictment against a timber merchant in St. John's street, London, for an obstruction of a part of the street in the hewing and sawing of logs. The defense was that he occupied a small timber yard in the vicinity where the alleged offense was committed, and that owing to the narrowness of the street at that place, and the construction of his own place, he had in several instances necessarily deposited long sticks of timber in the street, and had them sawed into shorter pieces there, before they could be carried into the yard; and it was urged by his counsel that he had a right to do this as it was necessary to the carrying on of his business, and that it could not occasion any more inconvenience to the public than draymen taking hogsheads of beer from their drays and letting them down into a cellar. The learned judge said: "If an unreasonable time is occupied in delivering beer from a brewer's dray into the cellar of a publican, this is certainly a nuisance. A cart or wagon may be unloaded at a gateway, but this must be done with promptness. So as to the repairing of a house the public must submit to the inconvenience occasioned necessarily in repairing the house; but if this inconvenience should be prolonged for an unreasonable time, the public have a right to complain, and the party may be indicted for a nuisance. The rule of law upon this subject is much neglected, and great advantages would arise from a strict, steady application of it. I cannot bring myself to doubt the guilt of this defendant. He is not to eke out the inconvenience of his own premises by taking in the public highway into his timber yard, and if the street be too narrow he must move to a more commodious place for carrying on his business."

SEC. 264. In *Rex v. Cross*, 3 Camp. 224, which was an indictment against the defendant for allowing his coaches to remain an unreasonable time in the public highway near *Charing Cross*, a similar doctrine was held. In that case the defendant was a proprietor of a Greenwich stage coach which came to London twice a day and drew up opposite to a banking house on one side of the street, where it would usually remain about three-quarters of

an hour taking in parcels and waiting for passengers. Lord ELLENBOROUGH, in delivering the opinion of the court, among other things, said: "Every unauthorized obstruction of a highway to the annoyance of the king's subjects is a nuisance. The king's highway is not to be used as a stable yard. * * * A stage coach may set down or take up passengers in the street, this being necessary for public convenience, but it must be done in a reasonable time, and private premises must be provided for the coach to stand while waiting between one journey and the commencement of another. No one can make a stable yard of the king's highway."

SEC. 265. The leading American case on this subject is that of *The People v. Cunningham*, 1 Denio (N. Y. S. C.), 524. In that case the defendants were the owners of a brewery on Front street in the city of Brooklyn, and, in the process of their business as brewers, they accumulated large quantities of swill or slops, being the grains remaining after distillation. These they sold.

On their premises there were vats or reservoirs, and running from them were several twelve inch pipes extending over the sidewalk, sufficiently high for persons to walk under them, into the street about two feet beyond the curb stone. Persons wishing to take away the slops came with their carts and wagons, and, driving under the ends of these pipes, received their load, which was let off by means of faucets in the ends of the pipes, thus conducting the contents of the vats into tubs or hogsheads standing in the carts or wagons brought to take it away. The teams and vehicles, of which considerable numbers were usually waiting to be served, were formed into lines on each side of the street, frequently occupying its center. They were driven to the place where the slops were discharged and were loaded up and driven off as their turns came, according to the order in which they stood. A collection of teams was thus accumulated at that point in the street to such an extent that it was frequently blocked up from an early hour in the morning until late in the evening, so that persons wishing to pass through the street were prevented from doing so. It was insisted by the defendants that, their business being a lawful one at the place where it was con-

ducted, they had a right to use so much of the street as was necessary to deliver the slops, etc., provided they used reasonable diligence and dispatch. And the defendants also insisted that they were not liable for the obstruction caused by the teams and carts, unless they were the owners thereof, or had the control or direction of them, or unless they sanctioned the obstruction. That they were not chargeable for an obstruction of the street occasioned by their customers coming there on their lawful business and of their own accord. That the law did not regard it as a probable consequence of their invitation to their customers, that the streets should be obstructed by their resort there, or raise the presumption that they sanctioned the obstruction. The court, however, charged the jury that, assuming the defendants' business to be a lawful one, if by their neglect or inability to accommodate the owners of the vehicles resorting there for the slops, they compelled them to stand in the streets awaiting their turns, they were guilty of the obstruction to the highway thereby occasioned. That the defendants were bound to accommodate their customers coming there in some more convenient place than in the streets of the city, but that the jury must, in order to convict the defendants, find that the teams came there by the sufferance and permission of the defendants, and that their accumulation there was the probable consequence of the manner in which the defendants carried on their business. The jury convicted the defendants, and the case was heard in the supreme court on exceptions, where the charge of the judge was fully sustained, and the cases of *Rex v. Russell* and *Rex v. Jones* were referred to by JEWETT, J., in delivering the opinion of the court, and their doctrine was approved.¹

¹In a recent case heard before the General Term of New York, *Jones v. Chantry*, 4 N. Y. Sup. Ct. (Parsons' ed.) 63, the defendant was held liable for damages sustained by the plaintiff by personal injuries, under the following circumstances: The defendant was a wagon-maker, having a shop on the east side of the road, and allowed his wagons to stand in and near the gutter and extending nearly to the center of the highway. He also owned a lot on the opposite side of the street, and contracted with a builder to erect

thereon a brick house and furnish the materials, except the brick. The contractor deposited a lot of sand and lime in the highway, extending to within twenty-two feet of the ditch on the east side, leaving a space of only three and one-half feet for carriages to pass. The plaintiff passing over the road in a dark night, there being no guards or lights in the vicinity of the obstructions, ran upon the sand and was injured. The court held that, in view of the use to which the defendant devoted the opposite side of the

SEC. 266. If a person doing business upon a public street carries on his business in such a way as to obstruct the street either by placing actual physical obstructions thereon, or by habitually carrying on his business in his store in such a way as to collect crowds upon the walk or street in front of it, so as to interfere with the public travel, he is chargeable for a nuisance. Thus in *Rex v. Carlisle*, 6 Car. & Payne, 636, the defendant, who was a book-seller upon a principal street in London, placed in his window an effigy of a bishop of the church, and placed a placard thereon upon which was written the words "Spiritual Broker," and also placed a figure of the devil beside it, with the arm of the bishop holding on to the arm of the devil. This exhibition naturally attracted large crowds of people to look at it, and the result was that the walk in front of his shop was blocked up to such an extent at times that people desiring to pass had to go off the walk into the street in order to do so. The defendant was indicted for creating a nuisance, and the trial came on before PARK, J., and a jury. The judge charged the jury that the defendant had a right to do what he chose upon his own premises, provided he did nothing to annoy or injure his neighbors or the public; but that if the exhibition caused the footway to be obstructed, so that the public could not pass as they ought to do, this was an indictable nuisance, and that it was not necessary that the figure should be libelous, or that the crowd thereby attracted should be idle, disorderly or vicious persons. The defendant's counsel having argued to the jury that the offense committed by the defendant was of no different character from certain processions and celebrations that were often conducted in the public street, the judge said: "The defendant has observed upon the Lord Mayor's day; but that is but one day in the year; and if, instead of that, the Lord Mayor's day lasted from October to December I should say it ought to be put a stop to."¹ In the case of *Morristown v. Moyer*, 67 Penn. St. 355, it was held that

street, he was liable for the injury notwithstanding the fact that the sand and lime were placed in the highway by the contractor.

¹ *Rex v. Cross*, 3 Camp. 226; *Rex v. Jones*, id. 230; *Rex v. Russell*, 6 East, 427; *Com. v. Milliman*, 13 S. & R.

(Penn.) 403; *Wilkes v. Hungerford Market*, 3 Bing. 281; *Jacob Hall's Case*, 1 Ventris, 169; *Palmer v. Silvertham*, 32 Penn. St. 65; *Bostock v. No. S. R. Co.*, 19 Eng. Law & Eq. 307; *Rex v. Moore*, 3 B. & Ad. 184.

persons standing and lounging on the walks are public nuisances, and indictable and punishable as such.

SEC. 267. The collection of a crowd in a public street, by loud and indecent language, is a public nuisance;¹ but it has been held that "making a speech" in a public street is not *per se* a nuisance, but may become so if it results in the collection of a crowd so as to obstruct the streets. And it seems that when a person collects a crowd in a street he is not liable civilly for all injuries that are sustained in consequence thereof, but only for such as are the probable and *proximate* cause of the act.² It would be impracticable and unjust to hold that a person who collects a crowd in the street, either by accident or design, should be held chargeable for all the injuries that flow therefrom, and the law, with a just discrimination, only charges him with liability for such acts, as are consistent with his acts and the attending circumstances. Such as may properly be regarded as the probable and proximate cause of the injury.³

SEC. 268. Any unauthorized excavation made in or near a highway is a nuisance, not only subjecting the party to indictment, but also to liability to respond in damages to any person who is injured thereby while lawfully passing over the highway, in the exercise of ordinary care.⁴ And it is equally a nuisance, and an equal liability attaches thereto to maintain an open area adjoining a public street;⁵ to maintain cellar openings not properly guarded;⁶ to erect or maintain steps or stairs or a stoop, bow windows, or any projection upon or over a public street that can in anywise interfere with or endanger public travel,⁷ or to blast rocks or follow any other occupation near a highway that en-

¹ *Barker v. Commonwealth*, 7 Harris (Penn.), 412.

² *Fairbanks v. Kerr*, 70 Penn. St. 88; 10 Am. Rep. 684. A lawful procession with life and drum is not *per se* a nuisance. *State v. Hughes*, 73 N. C. 25.

³ *Fleming v. Beck*, 12 Wright (Penn.), 313; *Penn. R. R. Co. v. Kerr*, 62 Penn. St. 333; *McGraw v. Stone*, 53 id. 441; *Scott v. Hunter*, 10 Wright (Penn.), 192; *Morrison v. Davis & Co.*, 8 Harris (Penn.), 171.

⁴ *Barnes v. Ward*, 19 L. J. (C. P.) 200; *Jarvis v. Dean*, 11 Moore, 334; *Coupland v. Hardingham*, 3 Camp. 398; *Bishop*

v. Trustees, 1 El. & El. 697; *Pickard v. Smith*, 10 C. B. (N. S.) 470; *Fisher v. Brown*, 31 L. J. 219; *Chicago v. Robins*, 2 Black, 418; *Clark v. Fry*, 8 Ohio, 359; *Iveson v. Godfrey*, 12 Ill. 20.

⁵ *Irvin v. Wood*, 51 N. Y. 224; *Congreve v. Smith*, 18 id. 79; *Congreve v. Morgan*, id. 84.

⁶ *Coupland v. Hardigan*, 3 Campb. 398.

⁷ *Com. v. Blaisdell*, 107 Mass. 234; *Regina v. Burt*, 11 Cox's C. C. (Eng.) 399.

dangers the safety of those passing over it.' Under this head are included all coal holes, cellar flaps, or openings of any kind, covered or otherwise.'

In *Irvine v. Wood et al.*, 51 N. Y. 224, Commission of Appeals, the plaintiff fell into a coal hole in the sidewalk in front of a dwelling owned by the defendant Fowler, and occupied by the defendant Wood, as a tenant, and sustained serious injuries therefrom. The defendant Fowler was not the owner of the fee of the premises, but held the same under a lease for twenty-one years, assigned to him by one Higgins, who leased the premises from the owner of the fee. The defendant Wood rented the premises of Fowler, and paid rent to him therefor. It does not appear either from the opinion of the court, or the statement of the case, whether the coal hole was made and existing at the time when the defendant Fowler took his assignment of the lease from Higgins, or except by inference when the defendants Wood took their lease from Fowler. The lease was of premises 596 Broadway, bounded by the south-easterly side of Broadway, with the appurtenances. There was a coal hole opening in the sidewalk in front of the premises, and leading thence into a vault which was a part of the demised premises occupied by Wood.

Wood used the hole for putting in coal. The cover of the coal hole was a smooth cast-iron plate, lying flat on the pavement, there being no groove in the stone to hold it in place. It had no chain or other means of fastening it from below. The defendants Wood offered to prove that the accident was caused by the original defect of the cover, and that the defect in its construction was not known to them. This evidence was not admitted by the court. There was no proof of negligence on the part of any of the defendants. The defendants insisted that the action would not lie, and should be dismissed, because the defendants were not jointly liable, and that there was no proof of negligence on their part in the use of the hole, and because it did not appear that the coal hole was a part of the premises occupied by them. These motions were denied, and the court charged the jury that the defendants

¹ Reg. v. Muttons, 34 L. J. 22.

53; Holmes v. N. E. R. R. Co., L. R., 4

² Hadley v. Tayler, L. R., 1 C. P. Exch. 254.

were liable to the plaintiff, and that the only question for them was the amount of damage.

The opinion of the commission of appeals was delivered by EARLE, J.

"These defendants did not allege in their answer, that the coal hole was constructed by any license from the proper city authorities. They simply put in issue the allegations in the complaint as to the conditions of the hole, and their conduct in reference to it; and they did not ask the court to submit to the jury the question whether the coal hole and the cover over it were constructed under a permit from the proper city authorities. Hence they are not in a condition to claim here that the hole was authorized by competent authority. It may then be treated as a nuisance, being an unauthorized excavation in the street; and persons who continued, or in any way became responsible for it, were liable to any person who might be injured thereby while traveling upon the street, irrespective of any question of negligence on their part.¹ In such cases the wrong consists, not in any negligence, but in making or continuing the wrongful excavation in the street. But here there was evidence that the cover to the hole was in an imperfect condition; that it was not properly fastened. This upon the trial was not disputed by the defendants Wood. They claimed and offered to show that the cover was originally imperfectly constructed, and they claimed immunity because the imperfection was not caused by or known to them.

Even if this hole was excavated on the street by permission of competent authority, the persons who originally excavated it were bound to do it in a careful manner, and to see that it was properly and carefully covered, so as not to be perilous to travelers on the street. They could get from the city authorities no license for carelessness, for in such case, the city itself would be liable for the carelessness of its officers,² and this liability attached not only to those who made the excavation, but to those who continued and used it, in its improper and unsafe condition. If the defendants would use this hole as an appurtenance to their premises, it was their duty to see that it was in proper repair, and

¹ *Congreve v. Smith*, 18 N. Y. 79; ² *Barton v. City of Syracuse*, 86 *Congreve v. Morgan*, id. 84; *Creed* N. Y. 54.
v. Hartman, 29 id. 591.

they could not shield themselves from responsibility by claiming that their attention was not called to its imperfect condition. It was near their store in plain view, and it was carelessness for them to occupy the store for months and to use the hole, which, if not properly covered, was dangerous to travelers, and not examine into and know its condition. It was their *duty* to know its condition, and they must be held to the same responsibility as if they had actually known it.¹ In *McCarthy v. Syracuse*, 46 N. Y. 194, the action was to recover damages against the city, sustained by the plaintiffs, because a sewer was out of repair, and it was held that no notice to the city that the sewer was out of repair was necessary to fix its liability. The learned judge writing the opinion says: "Its duty to keep its sewers in repair is not performed by waiting to be notified by citizens that they are out of repair, and only repairing them when the attention of the officials is called to the damage they have occasioned, by having become dilapidated or obstructed; but it involves the exercise of a reasonable degree of watchfulness in ascertaining their condition from time to time, and preventing them from becoming dilapidated or obstructed. The same rule of active diligence should be applied to the persons who own or control coal-holes or other excavations in or under the streets of any city or village."²

We are, therefore, brought to the same conclusions, whether we treat this hole as made and continued in the street without proper authority, and hence, an absolute nuisance; or whether we treat it as made and continued under proper authority, and permitted to be and become out of repair. This hole was clearly appurtenant to the premises leased by the defendants Wood. It communicated with their cellar, and was used for access to it with coal. It matters not if it be true that other occupants of the premises could also use it.³ There is no proof that any one else

¹ *Tenant v. Goldwin*, Ld. Raym.; *Ryland v. Fletcher*, L. R., 1 Exchq. 263.

² *Ryan v. Fowler*, 24 N. Y. 414; *Coupland v. Hardringham*, 3 Camp. 398; *Wettor v. Dunk*, 4 F. & F. 298; *Hadley v. Taylor*, L. R., 1 C. P. 53; *Sybray v. White*, 1 M. & W. 435. See Cuff's

Admr. v. Newark & N. Y. R. R. Co., 35 N. J. 17, as to the degree of care required when an act ordinarily will be a nuisance.

³ *Barnes v. Ward*, 14 Jur. 334, cited *infra*.

did use it. They adopted it as appurtenant to their premises and did use, and this made them responsible for it.¹

Each one of several persons who continue a nuisance is responsible for it, and he may, as in all cases of wrong, be sued alone or with the other wrong-doers.

It is claimed that these defendants could not abate the nuisance, and hence, should not be made responsible for its continuance. If it was in the street without authority, and hence an absolute nuisance, in front of their store, they did have the right to abate it. They could have filled up the hole or covered it up with solid masonry. If the hole was properly and rightfully there they could escape responsibility by putting and keeping a proper cover over it.

Hence, I can see no reason upon the undisputed facts for not holding the tenants responsible for the damages arising from the nuisance. The landlord and tenant were properly joined as defendants. The tenants used it and paid rent for it, and they must all be treated as continuing, and hence, responsible for the nuisance."²

SEC. 269. In reference to cellar openings, or excavations and erections, such as fruit stands or other huckster stands, or any other interference with a public street or highway, whereby it becomes less safe or commodious for the purposes of public travel, the rule is the same. The person erecting or maintaining them, either or both, are liable civilly or criminally for all the consequences.³

Every person passing over a highway or street has a right to rely upon it that it is safe, and in a proper condition in all respects for the purposes of travel, while they themselves are in the

¹ *Brown v. Cayuga & S. R. R. Co.*, 12 N. Y. 486; *Blunt v. Aiken*, 15 Wend. (N. Y.) 522; *Davenport v. Ruckman*, 10 Bosw. (N. Y. Sup. Ct.) 20; *Butler v. Kent*, 19 Johns. (N. Y.) 223.

² *King v. Pedley*, 1 Ad. & E. 822; *Anderson v. Dickie*, 26 How. Pr. (N. Y.) 105; *Anderson v. Dickie*, 1 Rob. (N. Y. Sup. Ct.) 238; *People v. Erwin*, 4 Den. (N. Y.) 129; *Vedder v. Vedder*, 1 id. 257.

³ *Runyon v. Bordine*, 2 Green (N. J.), 472; *Barnes v. Ward*, 14 Jur. 334; *Hadley v. Tayler*, L. R., 1 C. P. 53; *Holmes v. N. E. R. R. Co.*, L. R., 4 Exch. 254; *Robbins v. Jones*, 15 C. B. (N. S.) 221; *Coupland v. Hardringham*, 3 Camp. 338; *Fruit Stands*; *Com. v. Wentworth*, 1 Whart. (Penn.) 318; *Smith v. State*, 6 Gill. 425; *Barnes v. Ward*, 14 Jur. 334.

exercise of ordinary care, and any act or thing that interferes with their safety is a nuisance.¹

In the case of *Ploedterll v. Mayor, etc., of New York*, recently decided in the court of appeals of New York, and reported in the Albany Law Journal, vol. 10, No. 12, p. 186-7, the action was brought to recover damages for injuries sustained by plaintiff in falling over a stone on a sidewalk in New York city. It appeared that a culvert in Sixth avenue had been covered by two iron plates, one of which having been destroyed the stone in question was placed over the hole; it did not appear who had placed it there, or that the place would have been dangerous if it had been removed; but it appeared the stone projected upon the sidewalk, and plaintiff passing along the street on a dark night struck and fell over it, breaking her leg—it had been there several months. The counsel for the defendants moved for a nonsuit on the grounds that there was no evidence that the city authorities had placed the stone there, and that no malfeasance was charged. The motion was denied. The court charged that it was immaterial who placed the obstruction there if it remained so long that the corporation was presumed to have had notice; it was bound to remove it and remedy the defect. No exception was taken to this charge. The principal point urged upon the appeal was, that, as it did not appear who placed the obstruction there, it could not be presumed that the defendant did it, and that express notice was required to render the defendant liable. But the court held that the case fell within the rule in *Requa v. Rochester*, 45 N. Y. 129, rather than that laid down in *Griffin v. Mayor, etc.*, 9 id. 456, and held the defendant chargeable.

But it should also be remembered that while a municipal corporation is liable under certain circumstances for injuries sustained by persons, by reason of obstructions placed in a street or highway; so too the individuals placing the obstructions there are also liable, and may be sued therefor instead of the corporation.² And in case the corporation is compelled to respond in damages it may have a remedy over against the wrong-doer.³

¹ *Dargie v. Magistrates*, 27 Sc. Jur. 311; *Davenport v. Ruckman*, 10 Bosw. (N. Y. Sup. Ct.) 20.

² *Steele v. Faxon*, 19 Pick. (Mass.) 147; *Smith v. Smith*, 2 id. 621; *Dobson*

v. Blackmore, 1 Ad. & El. 99; *Kirby v. Boylston Market Ass'n*, 14 Gray (Mass.), 247.

³ *Chicago v. Robbins*, 2 Black (U. S. C. C.), 280.

SEC. 270. In *Coupland v. Hardringham*, 3 Campb. 398, the action was for an injury received by the plaintiff in consequence of falling down an open area in front of the defendant's house on Wood street, Westminster, whereby the plaintiff was severely hurt. The area was in front of the defendant's house, and was descended by three stairs or steps from the street. There was no railing or fence to guard the area from the street, and the plaintiff passing along the house on a dark night met with the injury. The defense set up was that the area had existed in the same condition for many years, and long before he was in possession of the premises. Lord ELLENBOROUGH, in delivering the opinion of the court, said: "However long the premises may have been in this situation, as soon as the defendant took possession of them, he was bound to guard against the danger to which the public had been before exposed, and he is liable for the consequences of having neglected to do so, in the same manner as if he himself had originated the nuisance. The area belongs to the house, and it is a duty which the law casts upon the occupier of the house to render it secure."

SEC. 271. The rule is that a person making a dangerous erection, excavation, or other nuisance in a public street, lane or highway, is liable for all injuries arising therefrom during its continuance, and if he leases the premises, the lessee is also jointly liable with him, or either may be pursued separately. The landlord cannot avoid liability on the ground that he was not in possession, and had not the right of possession; neither can the tenant avoid liability on the ground that he did not erect it.¹ But when the landlord rents the premises and the tenant covenants to keep the same in proper repair, it is held in England, also in Ohio, Pennsylvania, Massachusetts and Michigan, that the tenant is solely liable, and in the latter State, that he is liable even though there are no covenants to repair.²

SEC. 272. In *Pretty v. Brickmore*, Law Times (N. S.), 180, an action was brought against the owner of a house, in the parish

¹ *Portland v. Richardson*, 54 Me. 46; *Barnes v. Ward*, 14 Jur. 334; *Congreve v. Smith*, 18 N. Y. 79; *Irvine v. Fowler*, 5 Rob. (N. Y. Sup. Ct.) 482; *Dygart v. Schenck*, 23 Wend. (N. Y.) 446.

² *Fisher v. Thirkell*, 21 Mich. 1.

of St. John, Hampstead, for negligently suffering a coal plate, covering a vault entrance in the highway before such house, to be out of repair, and a dangerous nuisance, and for letting the house to a tenant without obliging him to repair the same, whereby the female plaintiff lawfully passing along the highway fell through the aperture and was injured. In one count of the declaration was alleged a duty on the defendant, under the *Metropolitan Local Management Act*, 1855, 18 and 19 Vict., c. 120, as owners of the premises to repair and keep in repair the vault and openings thereto. The defendant denied his liability. At the trial, before BRETT, J., in Middlesex, on the 6th of May, the plaintiff proved the accident, and the occupier of the house was called as a witness on her behalf. He produced a lease from the defendant to himself of the premises in question. It contained the usual covenant by the lessee to keep them in repair. He said that the house was in course of alteration by the defendant at the time of the occurrence; that the plate was defective when his occupation began, and that he had repeatedly informed the defendant of that fact. The learned judge nonsuited the plaintiff.

BOVILL, C. J. I think this nonsuit was right, and that we ought not to grant a rule for a new trial. *Prima facie* a person in possession of a house and cellar, with a flap opening into the pavement, is the person responsible to the public for the dangerous state of the entrance. In this case the defendant was not in possession of the premises, he had let the premises to a tenant, and so *prima facie* there is no responsibility on the lessor.

Undoubtedly in many cases it has been held that where the landlord had let the premises in their defective state, which caused the damage to the plaintiff, or had not obliged his tenant, by the terms of the agreement between them, to do the necessary repairs, he, the landlord, was liable for the injury subsequently resulting. But in all those cases it will be found that the landlord had done some act toward the continuance of what had caused the damage, and by letting the premises had authorized the nuisance, for example, by building a wall in a dangerous state, and then letting them. As in *Todd v. Flight*, *supra*, where the defendant had let the premises; but there was an allegation

in the declaration that the defendant wrongfully suffered and permitted the chimneys to be and continue, and kept, and maintained the same in the ruinous state until the same afterward fell and injured the building of the plaintiff. Now, taking that statement as the reason on which the decision of the court was based, is it applicable to the present case, or are any of the cases cited by Mr. CAMPBELL FOSTER? Here, it is true, the cellar flap was in a dangerous state. Under these circumstances the defendant let the premises to a tenant, but did he authorize the continuance of the cellar flap? And whether that was in a dangerous state or not, can it be said he maintained it; was the continuance of the cellar flap the wrongful act of the lessor or of the lessee? Mr. FOSTER says the covenant in the lease did not oblige the tenant to repair the damaged cellar cover. I entirely differ and think that the premises being let in a state when repair was required, that fact being known to the lessee, there was a duty on him, under the ordinary covenant to repair, to put them into a proper state. I think there was no obligation on the lessor. If an action had been brought against the lessee he would have had no remedy against the lessor, who cannot be said to have caused or maintained the dangerous state of the cover plate (not having been in possession on his part), when he had done all in his power to remedy the defect by casting on the lessee the duty of doing the repairs. If he had been under obligation to repair and failed to do so, then the neglect would have been his fault, or if he had kept the lessee in ignorance of the defect; but such is not the case here, for the lessee well knew the defective condition of the coal plate. Under these circumstances the nonsuit was right."

In a recent case in Michigan (*Fisher v. Thinkell*, 21 Mich. 1), it was held that when the landlord caused a vault plate to be made properly secure, and it was in a secure condition at the time when the tenant went into possession, and there being no covenant on his part to repair, the landlord cannot be held liable for injuries resulting from the vault cover becoming defective while the premises are in possession of the tenant. The court base their doctrine upon the ground that the landlord cannot be made liable for a nuisance erected or created by the tenant. Which is very good law. But the court should have remembered that it was not

the tenant, but the landlord, who put in the vault cover, and that that being an unlawful interference with a highway, imposed upon the landlord the duty and obligation to keep it in a safe condition at his peril. The construction of the vault was the primary, and the neglect of the tenants the secondary cause of the injury. The doctrine of this case is supported by many authorities, but the rule seems to be opposed to the general doctrine of liability for nuisance.¹

SEC. 273. It is also a nuisance to make an excavation on one's own ground adjoining a highway, so near thereto as to endanger the safety of those traveling the street in the exercise of ordinary care, and to leave the same unguarded by some proper fence, railing or other protection against accident. And the same is also true of all excavations, areas, stoops or projections of any kind in a lane of the city used by the public, even if only for a limited purpose.²

¹ *Bears v. Ambler*, 9 Penn. St. 193; *Sewell v. Spaulding*, 4 Cush. (Mass.) 277; *Clark v. Fry*, 8 Ohio St. 358, in support of the doctrine; but *contra* see *Congreve v. Smith*, 18 N. Y. 79; *Congreve v. Morgan*, id. 84; also cases cited in note to section 273.

² *Stephani v. Brown*, 50 Ill. 428; *Fisher v. Thirkell*, 21 Mich. 1; *Barnes v. Ward*, 14 Jur. 334; *Temperance Hall Asso. v. Giles*, 33 N. J. 260; *Bacon v. The City of Boston*, 3 Cush. (Mass.) 174; *Hounsell v. Smith*, 7 C. B. (N. S.) 781; *Hardcastle v. The S. G. & R. D. Co.*, 4 H. & N. 70; *Binks v. The S. G. & R. D. Co.*, 3 B. & S. 244; *Hadley v. Taylor*, L. R., 1 C. P. 53; *Durant v. Palmer*, 1 Dutcher (N. J.), 544; *Collins v. Dorchester*, 6 Cush. (Mass.) 379; *Hubbard v. R. R. Co.*, 39 Me. 506; *House v. Metcalf*, 27 Conn. 631; *Calkins v. Hartford*, 33 id. 57; *Runyon v. Bordine*, 2 Green (N. J.), 472; *Beatty v. Gilmore*, 16 Penn. St. 463; *Portland v. Richardson*, 54 Me. 46; *Vale v. Bliss*, 50 Barb. (S. C. N. Y.) 358; *Irvine v. Spriggs*, 6 Gill. 200; *Irvine v. Wood*, 51 N. Y. 224; *Jarvis v. Dean*, 11 Moore, 354; *Holmes v. N. E. R. R. Co.*, L. R., 4 Exchq. 254; *Robbins v. Jones*, 15 C. B. (N. S.) 221; *Townsend v. Wather*, 9 East, 277; *Bird v. Holbrook*, 4 Bing. 628; *Lynch v. Merdin*, 1 Ad. & Ell. (N. S.) 29; *Illott v. Wilkes*, 3 Barn. & Ald.

304; *Birge v. Gardner*, 19 Conn. 507; *Daly v. Norwich*, 26 id. 571; *Housatonic R. R. Co. v. Knowles*, 30 id. 313; *Johnson v. Patterson*, 14 id. 1; *Brown v. Lynn*, 31 Penn. St. 510; *Kerwhacker v. Cleveland R. R. Co.*, 3 Ohio St. 172; *Whirley v. Whiteman*, 1 Head (Tenn.), 610; *Young v. Harvey*, 16 Ind. 315; *Trow v. Vt. C. R. R. Co.*, 24 Vt. 487; *Quimby v. Vt. C. R. R. Co.*, 23 id. 893; *Cleveland R. R. Co. v. Elliott*, 4 Ohio St. 474; *Robbins v. Chicago*, 2 Black (U. S.), 418; *Congreve v. Morgan*, 18 N. Y. 84; *Creed v. Hartman*, 29 id. 591; *Storrs v. Utica*, 17 id. 104; *Veazie v. Penobscot R. R. Co.*, 49 Me. 119; *Silvers v. Nordlinger*, 30 Ind. 53; *Blythe v. Topham*, 1 Rol. Abr. 88; *Brush v. Brainard*, 1 Cow. (N. Y.) 78; *Jordin v. Crump*, 8 M. & W. 782. See *Howland v. Vincent*, 10 Metc. (Mass.) 371; *Clark v. Fry*, 8 Ohio St. 358; *R. R. Co. v. Wood*, 48 Ga. 565; *Horman v. Stanley*, 66 Penn. St. 464; *Hays v. Gallagher*, 72 id. 136; *Sexton v. Lett*, 44 N. Y. 430; *Phenix v. Iron Co.*, 9 Wright (Penn.), 135; *Tobin v. R. R. Co.*, 59 Me. 183; *Perley v. Chandler*, 6 Mass. 454; *Dygert v. Schenck*, 23 Wend. (N. Y.) 446; *Wright v. Saunders*, 65 Barb. (N. Y. S. C.) 214; *Davenport v. Ruckman*, 10 Bosw. (N. Y. S. C.) 20; 37 N. Y. 568; *Anderson v. Dickie*, 1 Robt. (N. Y. S. C.) 238.

SEC. 274. But it seems when the excavation is made by permission of the proper authorities, if proper guards are erected, and they have been removed or put in unsafe condition by some stranger, and without the knowledge of the owner or occupier of the premises, and he is not chargeable with want of proper care in respect thereto, he is not liable, although, if unauthorized, no degree of care would avoid liability.¹

SEC. 275. So where a person has been authorized to make excavations in a street, by the proper authorities, or to make coal openings or cellar flap, he is bound at his peril, so far as human foresight can provide against accident, to keep them in a safe condition; to keep them properly guarded; to have them properly constructed and securely fastened; and is liable for all injuries that ensue, that could have been prevented by the exercise of the very highest degree of watchfulness and care.²

SEC. 276. The rule is with reference to all such authorized acts, that the individual making them must leave the street or walk in as safe a condition as it would be if the excavation had not been made, for the city government cannot exempt itself from liability for injuries resulting from an unsafe condition of the streets, and cannot delegate to others authority to make them so. Hence, even when a city authorizes an excavation to be made, its authority to make it only warrants its being made in such a manner as shall not in any measure detract from the safety of the streets for public travel. And as the city itself cannot justify against a nuisance created by its officers, neither can any person justify against a nuisance created under a license from the city.³ A city

¹ *Proctor v. Harris*, 4 C. & P. 68; *Daniels v. Potter*, id. 70; *Drew v. New River Co.*, 6 id. 754; *Jarvis v. Dean*, 11 Moore, 354; *Stevens v. Stevens*, 11 Metc. (Mass.) 251; *McManus v. Citizens Gas-light Co.*, 40 Barb. (N. Y. Sup. Ct.) 380; *Bryne v. Great Western R. R. Co.*, 2 B. & S. 402.

² *Irvine v. Wood*, 51 N. Y. 224; *Irvine v. Fowler*, 5 Rob. (N. Y. Sup. Ct.) 482; *Robbins v. Chicago*, 2 Black. (U. S.) 418; *Jones v. Bird*, 5 Barn. & Ald. 837; *Whitehouse v. Fellows*, 10 C. B. (N. S.) 765; *Brownlow v. Met. Board*, 13 id. 768; *Cushing v. Adams*, 18 Pick. (Mass.) 110; *Homan v. Stanley*, 66 Penn.

St. 464; *Hayes v. Gallagher*, 72 id. 136; *McManus v. C. G. Co.*, 40 Barb. (N. Y. S. C.) 380; *Drew v. New River Co.*, 6 C. & P. 754.

³ *Irvine v. Wood*, 4 Robt. (N. Y. Sup. Ct.) 138. In *Cosgrove v. Morgan*, 18 N. Y. 84, which was an action for injuries sustained by falling into an area on Thirty-first street, in New York city, by reason of the breaking of a flagstone in the walk in the front of the defendant's premises, *STRONG, J.*, laid down the rule as follows: "The liability of the defendants does not depend upon their negligence in providing an unsuitable stone, or continuing

cannot authorize any encroachment upon or obstruction of a public street, or any part of it that is inconsistent with the reasonable safety of transit over it. Hence, it cannot authorize the construction of stoops, steps, bow windows or other projections upon or over a street or walk that interfere with the convenience or safety of travel.¹

SEC. 277. As has been previously stated every person in traveling upon a public street has a right to absolute safety, while in the exercise of ordinary care, against all accidents arising from obstructions of or imperfections in the street, and this applies as well to what is in the street as to what is over it.

Therefore, a building with a pitch roof extending over a public street or walk, or so near thereto that the rain or snow falling upon the roof, or the ice accumulating thereon in winter, descends upon the street so as to injure either the person or property of those lawfully traveling there, is a nuisance, and the owner is liable for all damages arising therefrom; and the fact that he is

the use of it after it had become unsuitable from any cause, *but upon the fact that the stone was unsafe at the time when the injury happened.* When the stone became unsafe from any cause, the area was a *public nuisance*, in like manner as *any* injury or obstruction to the street would be, and the defendants who continued it were responsible for it to the public and to individuals who sustained damages from it without negligence on their part. *They were bound, at their peril, to keep the area covered in such a manner that it would be as safe as if the area had not been built.* This measure of liability is essential to the public interests and the protection of the rights of individuals." In *Dyert v. Schenck*, 23 Wend. (N. Y.) 446, the defendant dug a ditch across the highway on his own premises to conduct the water to his premises, and erected a bridge across the ditch. The plaintiff's horse fell through the bridge by reason of the breaking of a plank, and this action was brought for the damages. COWEN, J., in delivering the judgment of the court, said: "The defendant committed no trespass in digging the ditch. It was on his own soil. The only right adverse to his, was one to

have a common highway for the purposes of travel. *All the public could require was, that he should make and keep the road as good as it was before he dug the ditch.* * * * Any act of an individual done to a highway, though performed on his own soil, *if it detracts from the safety of travelers, is a nuisance.*" *Hart v. The Mayor*, etc., 9 Wend. (N. Y.) 607; *Congreve v. Smith*, 18 N. Y. 79; *Robbins v. Chicago*, 2 Black. (U. S.) 418; *Davis v. The Mayor*, etc., 14 N. Y. 506; *Com. v. Nashua & Lowell Railroad Co.*, 2 Gray (Mass.), 54; *Com. v. Vt. & Mass. Railroad Co.*, 4 id. 22; *Com. v. Erie & Northeast Railroad Co.*, 27 Penn. St. 339; *McManus v. Gas-light Co.*, 40 Barb. (N. Y. S. C.) 380; *Selden v. Delaware & Hudson Canal Co.*, 29 N. Y. 634; *Stevens v. Stevens*, 11 Metc. (Mass.) 251; *Jones v. Bird*, 5 B. & Ald. 837; *Brownlow v. Metropolitan Board*, 16 Exch. 546; *Brine v. Great Western Railroad Co.*, 2 B. & S. 402.

¹ *Commonwealth v. Blaisdell*, 107 Mass. 234; *Congreve v. Smith*, 18 N. Y. 79; *Congreve v. Morgan*, id. 84; *Irvine v. Fowler*, 5 Robt. (N. Y. Sup. Ct.) 482; *Harlow v. Hummiston*, 6 Cow. (N. Y.) 161.

not in possession of the premises, and has no right to enter to remove the ice or snow that may accumulate there, is no defense to an action against him for injuries arising therefrom. The roof itself in such a position is a nuisance.¹ It would seem that all sign boards, cornices, blinds, awnings or other things projecting over a walk, or so situated with reference thereto that if they fall they may do injury to travelers, as well as things set against the building, or swinging doors, are nuisances, unless so secured as to be absolutely safe, and the person maintaining them is liable for all injuries arising therefrom, except such as are attributable to inevitable accident.² The same is also true in reference to things falling from the windows or roofs of houses.

1. A building so erected that its roof overhangs the street is a nuisance, and its erection and maintenance is an indictable offense. *Garland v. Towne*, 55 N. H. 55. So a cornice. *Grove v. Fort Wayne*, 45 Ind. 429.

2. *Shepley v. Fifty Associates*, 101 Mass. 251; *Cogswell v. Lexington*, 4 Cush. (Mass.) 307; *Hayden v. Attleboro*, 7 Gray (Mass.), 338; *Rice v. Montpelier*, 19 Vt. 470; *Cobb v. Standish*, 14 Me. 198; *Tully v. Portsmouth*, 35 N. H. 303; *Taylor v. Peckham*, 5 Am. Rep. 579; *Jones v. Boston*, 6 id. 194, where it is held that, while the city is not liable for injuries resulting from insecure signs, awnings, etc., yet the individuals maintaining them are; *Hixon v. Lowell*, 13 Gray (Mass.), 59; *Rowell v. Lowell*, 7 id. 100; *Trenor v. Jackson*, 46 How. Pr. (N. Y.) 389; *Bryne v. Beadle*, 33 Law J. Exch. 13; *Domat*, Civ. Law 2, tit. 33, l. 10, 11; *Scott v. London Dock Co.*, 34 Law J. Exch. 17, also 22.

In *Salisbury v. Herchenroder*, 106 Mass. 458 (8 Am. Rep. 354), which was an action to recover for injuries done to a building owned and occupied by the defendants on Avon street, Boston. The defendant was the owner of an adjoining building, and had suspended a sign or banner over the street. Due care was observed in the construction and fastening of the sign. It was blown down by an extraordinary gale, and in its fall a bolt, which was a part of the fastenings, was hurled into the window of the plaintiff's building, causing the injury for which suit was brought.

CHAPMAN, C. J., said: "If the defendant's sign had been rightfully placed where it was, the question would have been presented whether he had used due care in securing it. If he had done so, the injury would

have been done without his fault, by the extraordinary and unusual gale of wind which hurled it across the street and against the plaintiff's window. The party injured has no remedy for an injury of this character, because it is produced by the *vis major*. For example, a chimney or roof properly constructed and secured with reasonable care, may be blown off by an extraordinary gale and injure a neighboring building; but this is no ground of action. But the defendant's sign was suspended over the street in violation of a city ordinance. (Suppose there had been no ordinance, would not his liability have been the same?) His suspension of the sign over a public street, whereby the safety of persons in the street was endangered, was a *public nuisance* which the city could not license, and for which the defendant was subject to indictment at common law.

It is contended that the act of the defendant was a remote, and not a proximate cause of the injury. But it cannot be regarded as less proximate than if the defendant had placed the sign there while the gale was blowing; for he kept it there until it was blown away. In this respect it is like the case of *Dickinson v. Boyle*, 17 Pick. (Mass.) 78. The defendant had wrongfully placed a dam across the stream on the plaintiff's land, and allowed it to remain there, and a freshet came and swept it away and the defendant was held liable for the consequential damage. It is also in this respect like placing a spout by means of which the rain that falls

In *Daniels v. Potter*, 4 C. & P. 262, the defendant was a tradesman and maintained a cellar door which opened over the walk and set back against his house, and had provided no fastening to hold the door back when it was thus thrown back. A little boy playing with the door threw it over upon the plaintiff who was passing in the street, and broke his leg. It was held that the defendant was liable for the damages resulting from the injury. Where, however, a right has been acquired to maintain such a door by prescription, before the street is adopted as such, or where the person maintaining it is authorized to do so by the city authorities, he is only liable for a lack of reasonable precaution in guarding against such accidents, or, in the language of TINDALL, C. J., in the same case: "A tradesman under such circumstances is not bound to adopt the strictest means for preventing accidents, but he is bound to use reasonable precaution, such as might be expected from a reasonable man."¹

SEC. 278. In *Vale v. Bliss*, 50 Barb. (N. Y. S. C.) 358, the defendants made an excavation on and in front of their own premises adjoining the street, and threw out a quantity of stone and dirt which was piled on the sidewalk. The plaintiff, while walking along the street on a dark night, came in contact with the pile of earth and stones so thrown on the walk of the defendant, and to avoid it, and in his efforts to pass along, followed around on the premises of the defendant and fell into the excavation and was seriously injured.

The court held that the defendants were liable. GILBERT, J.,

is subsequently carried upon the plaintiff's land. The act of placing the spout does not alone cause the injury, the action of the water must intervene and this may not occur for some time afterward, yet the placing of the spout was the proximate cause. So the force of gravitation brings down a heavy substance, yet a person who carelessly places a heavy substance where this force will bring it upon another's head, does the act which proximately causes the injury that produces it. The fact that a natural cause contributes to produce an injury, which could not have happened without the unlawful act of the defendant, does

not make the act so remote as to excuse him. The case of *Dickinson v. Boyle* rests upon this principle. See, also, *Woodward v. Akorn*, 35 Me. 271, where the defendant wrongfully placed a deleterious substance near the plaintiff's well and an extraordinary freshet caused it to spoil the water; also, *Barnard v. Pavor*, 21 Pick. (Mass.) 373, where the plaintiff's property was consumed by a fire carelessly set by the defendant on an adjoining lot; also, *Pittsburgh City v. Greer*, 22 Penn. St. 54; *Scott v. Hunter*, 46 id. 192; *Polack v. Ploche*, 35 Cal. 416." The cornice of a building projecting over a sidewalk in such a manner as to be dangerous to travelers, is a nuisance. *Grove v. Fort Wayne*, 45 Ind. 439. So the projection of a bow window may be a nuisance. *Jones v. Williams*, 115 Mass. 217.

2. *Proctor v. Harris*, 4 C. & P. 337.

in delivering the opinion of the court, adopted the doctrine of *Bird v. Holbrook*, 4 Bing. 628 and the other English cases cited *ante*, and says: "These cases affirm the liability of a party who makes an excavation upon his own land so near to a highway that a person lawfully using the highway, and using ordinary caution, accidentally slipping might fall into it, on the ground that such excavations amount to a public nuisance. We think the principle is a sound one."

SEC. 279. An area opening into any public footway, or so near thereto that persons lawfully using the way with ordinary care might by accident fall into it, is *per se* a nuisance, and only ceases to be such when proper means are taken, as by an inclosure or otherwise, to guard against it.¹ And the existence of similar apertures all through the city does not operate in the slightest measure as a defense.² It must either be actually inclosed, or be protected with lights in the night time, so that a person using ordinary care would avoid the danger.³

SEC. 280. In *Barnes v. Ward*, 14 Jurist, 334, it was held that where a person excavates in his own ground, adjoining a highway, so that the use of such highway is rendered unsafe to the public, using ordinary care, the person so making the excavation is liable in damages for all the consequences. In such cases the liability arises from the possession as well as the ownership of the premises, and it is therefore sufficient to set up the fact of the defendant being in possession of the premises, with the appurtenances, of which the excavation is a part.

SEC. 281. In *Chicago v. Robbins*, 2 Black. (U. S.) 418, it was held that *any* person who used the streets of a city, so as to produce injury to another in the lawful use of the street, is liable therefor, and that, if the city or other municipal corporation has been compelled to respond in damages to a person receiving an

¹ Temperance Hall Association v. Trenton v. Giles, 33 N. J. 260; Bacon v. The City of Boston, 3 Cush. (Mass.) 174; *Chicago v. Robbins*, 2 Black. (U. S.) 418; *Veazie v. Penobscot R. R. Co.*, 49 Me. 119; *Silvers v. Nordlinger*, 30 Ind. 53.

² *Barnes v. Ward*, 9 M. G. & S. 392.

³ *Hounsell v. Smith*, 7 C. B. (N. Y.) 731; *Temperance Hall Association v. Giles*, *ante*; *Binks v. S. G. & R. D. Co.*, 4 H. & N. 60.

injury therefrom, it may have its remedy over, against the person from whose unlawful use of the streets the injury occurred. And it was also held in this case that when the work is done by a contractor, if the necessary result of doing the work is to create a nuisance, the principal is liable for all damages that result therefrom; and that, if the nuisance results from the *manner* in which the work is done, and not as a necessary result of doing the work, the contractor alone is liable for the damages.¹

SEC. 282. In *Congreve v. Smith*, 18 N. Y. 79, which was an action brought to recover damages for personal injuries sustained by a young child by reason of being precipitated into an area under the sidewalk in front of the defendant's premises, Thirty-first street, in the city of New York, by the breaking of a flagstone over the area. It appeared upon the trial that the plaintiff lived with his father in the second story of the building over the store, and that the plaintiff's father, by permission of the defendant, had placed some of his goods in the area, but used it only temporarily and paid no rent therefor. The defendant was the owner of the building, but did not occupy any portion of it. The area extended under the street, and was covered by the flagstone in question. The flagstone was set by a contractor, who contracted to do all the work in a workmanlike and substantial manner, and to furnish good and sufficient materials therefor. A verdict was given for the plaintiff at circuit, and the question came before the court of appeals, where the opinion was delivered by STRONG, J., as follows: "The verdict of the jury involves the finding that the stone covering the area was unsuitable and unsafe for that purpose, wherefore it broke, and the plaintiff received the injury in question. *The area was under the surface of the public street*, and was maintained for the benefit of the property of the defendant, and the stone was placed over it under contractors with the defendant for the completion of the defendant's building in pursuance of the contract. No license from the city for the area was proved. It certainly is just that persons who, without special authority, make or continue a covered excavation in a public street or highway for a private purpose, should be responsible for all injuries to individuals resulting

¹ But not if the corporation itself contributed to the nuisance. *Knox v. Sterling*, 73 Ill. 214.

from the street or highway being thereby unsafe for its appropriate use, there being no negligence by the parties injured ; and I entertain no doubt that a liability to that extent is imposed upon them by law. * * * The general doctrine is, that the public are entitled to the street or highway in the condition in which they placed it ; and whoever, without special authority, materially obstructs it, or renders its use hazardous, by doing any thing upon, above or below the surface, is guilty of a nuisance, and, as in all other cases of a public nuisance, individuals sustaining special damage from it, without any want of due care to avoid injury, have a remedy by action against the author or person continuing the nuisance. *No question of negligence can arise, the act being wrongful.* It is as much a wrong to impair the safety of a street by undermining it, as by placing objects upon it. There can be no difference in regard to the nature of the act or the rule of liability, whether the fee of the lands within the limits of the easement is in a municipal corporation, or in him by whom the act complained of was done ; in either case the act of injuring the easement is illegal."

SEC. 283. The owner of the fee in the highway has no more right to do any act upon the highway that will endanger the safety of public travel than a stranger. The public easement is superior to all other rights, and no one has any right to impair it in the slightest degree — not even the owner of the soil. It is true that he may maintain trespass against one who abuses his right of transit over it, or ejectment against one who encroaches upon any part of it, and that he may do any act upon it that does not in anywise impair the value or safety of the public easement. The public takes an easement in the land for the use of the public for the purposes of transit, and such uses as are incident thereto, but the beneficial use of the soil, beyond that, rests in the owner of the fee. A case recently came before the supreme court of New York, at general term, involving a discussion of these questions, and presenting the true doctrine of the relative rights of the public and the owner of the fee, as forcibly as any case that has come under my observation, and the clear and terse manner in which it is enunciated will commend it

as a high authority upon this question. I refer to the case of *Strickland v. Woolworth*, 3 N. Y. S. C. 386. The action was brought against the defendant to recover damages for destroying certain roadways built by the plaintiff from the traveled track of the highway to his land adjoining. The plaintiff owned the land on both sides of the highway. It appeared that the traveled bed of the highway on the side-hill had been graded up to the point in question, some four or six feet, so that plaintiff could not pass to a house and spring that he owned on the highway. He accordingly erected the roadway and a wall leading from the highway across a stream that crossed the highway to his land. The defendant tore away the wall and roadways, and justified his action upon the ground that it prevented him from watering his cattle in the stream, as he had been accustomed to do for more than twenty years, and was a nuisance.

E. DARWIN SMITH, J., in delivering the opinion of the court, said: "The defendant had no rights in the highway except to travel over it as an ordinary traveler, and this right was in no wise interfered with, interrupted or hindered by the plaintiff's erection. He had no easement in the highway for the purpose of access to the creek intersected by the same, or any rights in said highway of a private nature. The defendant might just as well have cut down the shade trees which the plaintiff might have set out in front of his premises on either side of the highway, or have torn up the walk from his front gate to the road, as to have torn away the erection in question."

The doctrine of this case is really this: The public acquires no right to a stream crossing the highway, by the laying out of a highway across the same. It simply takes an easement for the uses of public travel over the soil of the highway.

No person can acquire any beneficial easement by a long user of a stream of water, or any thing else located upon a highway or where the easement can only be enjoyed by using the highway as a medium to its enjoyment. I am not aware that this very question has ever been before the courts before, but the soundness of the doctrine is apparent. No person can acquire a private easement in a public highway. He may use it as a highway so long as the public sees fit to devote it to that use, but when the

public authorities see fit to abandon it, and establish a new way, the soil reverts to the adjoining owner free from all easements, and entirely rid of any burdens, except such as existed before it became a highway, consequently an easement in the water of a stream crossing the highway cannot be acquired, because it is liable at any time to be destroyed or ended by a discontinuance of the road, and therefore cannot exist as a servitude upon the estate upon which the stream is located.

SEC. 284. Where an act is authorized by an act of the legislature to be done, that would be a nuisance except for such authority, the grant is taken subject to the restriction that the highest degree of care will be exercised, that the act so authorized shall not operate as an injury to the public or to individuals. Therefore a railroad company authorized to use steam engines upon its road is bound to use those that are provided with the latest and best improvements to prevent the escape of sparks from its smoke stack, or of fire and coals from its fire box; and if it makes use of engines defective in these respects, when the defect might be remedied, or when, by the use of a different class of engines, the danger might be avoided, the engines will be treated as nuisances, and the company is liable for all the damages that result from their use.¹

SEC. 285. So, too, where a railroad company is authorized by its charter to lay its tracks in a certain locality, if it lays the track in another, the road becomes a nuisance upon every highway that it crosses.²

¹ *King v. Morris & Essex R. R. Co.*, 3 C. E. Green (N. J.), 377; *R. R. Co. v. Wood*, 48 Ga. 596; *Potter v. Bonner*, 20 Ohio St. 150; *Reg. v. Telegraph Co.*, 9 Cox's C. C. 174; *Veazie v. R. R. Co.*, 49 Me. 119; *State v. R. R. Co.*, 1 Dutcher (N. J.), 487; *Com. v. R. R. Co.*, 27 Penn. St. 339; *Hughes v. R. R. Co.*, 2 R. I. 493.

² In *Commonwealth v. Nashua & Lowell R. R. Co.*, 2 Gray (Mass.), it was held that the construction of a railroad across a highway in a manner different from that provided by law, is a nuisance and renders the company liable to indictment therefor, and its charter is no protection against the indictment.

Also see *Com. v. Vt. & Mass. R. R. Co.*, 4 Gray (Mass.), 22. In *Hughes v. Providence & Worcester R. R. Co.*, 2 R. I. 493, the power of a railroad company to interfere with a highway in a manner different from that provided by its charter was ably discussed. In that case the company by its charter was authorized to raise or lower any highway which its road might pass so that, if necessary, the road might pass over or under or across the highway. The court held that this did not authorize the company to widen a highway, nor to provide a new way in place of the old one, even though the new way or the alteration of the old one was more

So, too, where a railroad is laid alongside a highway, the company is bound to use the road in such a manner as is least calculated to interfere with the safety of public travel, over the highway, and if it allows the steam whistle to be blown unnecessarily, whereby horses upon the highway are frightened and injury results, the company is liable for the damages that result therefrom; or if it runs its trains over road crossings without taking proper measures to signal their approach to travelers upon the highway, it is answerable for all the consequences that flow from the lack on their part to exercise that high degree of care that is essential for the safety of the public, and is commensurate with the hazard which their business creates.¹

SEC. 286. The rule imposed upon railroad companies in their use of highways for the purposes of their road, virtually is, that they shall so run their trains as not to render the highway less safe than it was before the construction of their road over it, so far as reasonable care and diligence on their part can prevent it. The company is bound to take every reasonable precaution to notify the public of the approach of their trains, and to regulate their speed to a rate that is consistent with the safety of the traveling public in the exercise of ordinary care. There can be no

convenient for the public. And that in this respect, when the company interfered with a highway, except in accordance with the provisions of its charter, it created a nuisance, and became liable to any individual for damages that he sustained therefrom. Also, see *Regina v. United Kingdom Tel. Co.*, 3 Fost. & F. 73; *Att'y-Gen'l v. Ely*, L. R., 6 Eq. 106; *Moshier v. R. R. Co.*, 8 Barb. (N. Y. S. C.) 427; *Denver, etc., R. R. Co. v. Denver City R. R. Co.*, 2 Col. T. 673.

¹ *Lafayette, etc., Railroad Co. v. Adams*, 26 Ind. 76.

In *Toledo R. R. Co. v. Goddard*, 25 Ind. 185, it was held that when the engineer of a train has rung the bell and sounded the steam whistle, and reduced the speed of the train to a proper rate, upon approaching a crossing, he has done all that the law requires, and has fully complied with all the requirements imposed by the exercise of reasonable and ordinary care.

A person traveling upon a highway, upon approaching a railroad crossing

has a right, if the bell is not rung or the steam whistle sounded, to presume that the track is clear, and if he is himself in the exercise of ordinary care, the company is liable for all injuries that result to him by reason of a train being run over the crossing without these signals being given. *Philadelphia R. R. Co. v. Hogan*, 47 Penn. St. 244; *Chicago, etc., R. R. Co. v. Grotzner*, 46 Ill. 75; *Warner v. N. Y. Central R. R. Co.*, 45 Barb. (N. Y. S. C.) 279; *North Penn. R. R. Co. v. Hilman*, 49 Penn. St. 60. It is the duty of railroad companies upon approaching a road crossing with their trains, to give such signals and take such measures to apprise those passing upon the highway of the approach of the train to the crossing. If they fail in any of these duties they are liable to any person who, in the exercise of ordinary care, sustains injury therefrom.

Chicago & Rock Island R. R. Co. v. Still, 19 Ill. 499.

question but that if a railroad company habitually neglects to perform these duties to the public, and to exercise reasonable care in the running of its trains along or across a highway, it becomes and may be indicted as a public nuisance. The grant of the extraordinary franchise with which they are invested is upon the implied understanding that they shall exercise the rights conferred for the benefit and not to the detriment of the public, and that they shall adopt all possible measures not only in the kind of machinery employed, but also in the running of it, to prevent the infliction of unnecessary injury upon the public or upon private rights.¹ As illustrative of the degree of rigor with which courts enforce these duties upon the part of railroad companies, the action of the court in the case of *King v. The Morris and Essex R. R. Co.*, 18 N. Y. (Ch.) 397, furnishes an example. The plaintiff brought his bill to enjoin the defendants from the use of any coal-burning engines upon their railroad not supplied with such apparatus as would effectually prevent the communication of fire from it to the buildings of the complainant near the line of their road.

A. O. ZABRISKIE, Chancellor, said: "The case is a proper one for the interference of this court by injunction. The defendants must be restrained from running any coal engines on their road: if the consequences are necessarily such as are shown by the proofs in this case. The position taken by their counsel that the privilege of running locomotives upon their road, having been granted by the legislature, the residents and the owners of property in the vicinity must suffer the consequences without relief, is untenable. *The legislature never intended to grant and never did grant to them the right to scatter fire and desolation along their line to the width over which an engine could be contrived or constructed to throw burning coals. Their right to use locomotives was granted only upon the condition imposed by law upon the*

¹ *Regina v. Sharpe*, 3 Railway Cases, 33; *Regina v. Eastern Counties Railroad Co.*, id. 22; *Clarence Railway Co. v. Great North. of England, etc., R. R. Co.*, 13 M. & W. 706; *Bordentown & So. Amboy Turnpike Co. v. Camden & Amboy R. R. Co.*, 2 Harrison (N. J.), 314; *Moshier v. R. R. Co.*,

8 Barb. (N. Y. S. C.) 427; *Drake v. Hudson River R. R. Co.*, 7 id. 508. In this case it was held that a railroad in the streets of a city is not *per se* a nuisance, and that it will not become one, provided the passage over the street is left free and unobstructed.

use of all privileges and property, that they shall be so used as to do no unnecessary injury to others. If coal-burners cannot be used without such increase of danger as is shown in this case, it will be the duty of the company to abandon them and return to wood-burners."

SEC. 287. The same rule applies to any other class of acts that may become nuisances by their improper exercise. Thus legislative authority to erect a bridge or dam across a navigable stream cannot be construed as authorizing the person or corporation to make an erection that will materially interfere with the navigation of the river, or increase its hazards. All such rights must be exercised so as not to destroy either public or private rights, and unless they can be, or unless full compensation has been provided for the rights destroyed, the grant will not protect the person or corporation from suits in behalf of persons whose rights are injured, or prosecution by the public, for the injury to the public right, as to all its exercise beyond the reasonable scope of the grant. In other words the acts create a nuisance.¹

SEC. 288. In reference to private ways in a city or elsewhere, the rule seems to be that where a land owner has given permission to strangers, express or implied, to use a private way or path leading across his land, or if they permit a particular pathway to be used as an

¹ *Mississippi & Missouri R. R. Co. v. Ward*, 2 Black (U. S. S. C.) 485; *Hart v. The Mayor*, 9 Wend. (N. Y.) 181; *Lansing v. Smith*, 4 Wend. (N. Y.); 15 id. 133; *Rex v. Russell*, 6 B. & C. 566; *Williams v. Wilcox*, Ad. & EL 314; *Mayor of Georgetown v. Alexandria Canal Co.*, 12 Pet. (U. S. S. C.) 91; *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 13 How. (U. S. S. C.) 518. A bridge across a navigable stream is not necessarily to be enjoined as a nuisance; whether it partakes of that character depends upon circumstances; upon the extent to which it interferes with navigation and the relative importance of the traffic accommodated and interrupted by it. But the fact that a bridge is a great public benefit will not prevent its being a nuisance if it obstructs navigation. *Devoe v. Penrose Ferry Bridge*

Co., 3 Am. Law Reg. 79; *Mississippi & Missouri R. R. Co. v. Ward*, *supra*. Any obstruction to the navigation of a public navigable river, is upon established principles a public nuisance. *United States v. New Bedford Bridge Co.*, Wood & M. (U. S.) 401; *Mayor of Georgetown v. Alexandria Canal Co.*, 12 Pet. (U. S. S. C.) 91. A pier erected in navigable waters according to established regulations is not to be deemed a nuisance unless an actual obstruction to navigation be proved. *Dutton v. Strong*, 1 Black (U. S. S. C.) 23. The erection of a bridge over a navigable stream by authority of the State may prevent the bridge from being a public nuisance, but it is a private nuisance if it obstructs navigation, and persons injured may have their actions therefor. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 13 How. (U. S.) 518.

approach to their dwelling or place of business, they are not justified in doing any thing that will endanger the safety of persons passing over the way, without giving them proper notice of what has been done, or revoking the license or permission to come upon the land. Neither can they authorize any other person to do any act that will lessen the safety of those traveling over the way. If they desire to make any excavations, or do any thing in or adjoining the way that endangers its use, they must close it up.¹

SEC. 289. Every occupant of a house or place of business, who makes, or permits the use of a particular way to his house or store over his own grounds, is regarded as fairly holding out invitations to people, having occasion to come to his place for any reasonable purpose, to pass over the path, and he is liable for defects therein or for neglect to establish proper guards around dangerous places, and is held to the same degree of liability as a person who invites people to his store or place of business.² But if a person leaves the usual approaches to a house or place of business and strays upon a part of the ground where there is no path, and sustains injury from falling into excavations or unguarded wells, no liability therefor attaches to the owner of the path or any one else.³ Where a person gives another permission to cross his grounds by either of a number of paths, and the person so giving permission has dug a hole which he usually keeps covered, if he leaves the hole uncovered at night without the knowledge of the person so passing over his ground by permission, and in consequence he falls into the hole and is injured, the owner or occupant is liable therefor; but if the hole had never been covered the person would be remediless. The rule is, that a person who uses a private way accepts all the risks and liabilities that are fairly incident thereto, but has a right to expect that no changes in the condition of the way will be made that will endanger his safety in passing over it.⁴

¹ *Corby v. Hill*, 27 L. J. C. P. 320; *Hodman v. West Midland R. R. Co.*, 32 L. J. Q. B. 240; *Gallagher v. Humphrey*, 10 W. R. 664; *Gibbs v. Trustees of Liverpool Docks*, 27 L. J. Exchq. 321.

² *Lancaster Coal Co. v. Parnasby*, 11 Ad. & E. 243; *Indemaur v. Dames*, L. R., 1 C. P. 274; *Jarvis v. Dean*, 11

Moore, 854; *Barnes v. Ward*, 9 C. B. 420.

³ *Balch v. Smith*, 81 L. J. Exchq. 203.

⁴ *Rolle's Abr.* 88; *Gaudret v. Egerton*, L. R., 2 C. P. 371; *Harcastle v. So. Yorkshire R. R. Co.*, 4 H. & N. 74; *Blythe v. Topham*, Cro. Jac. 158; *Stone v. Jackson*, 16 C. B. 204.

SEC. 290. Any interference with a highway to change its grade or its course is an unlawful act and a nuisance, even though the highway is thereby improved and made more commodious for the purposes of travel.¹ The reason for this rule is apparent and is predicated upon a sound public policy. The public upon which is imposed the burden of keeping highways and streets in proper repair, and which is liable for all injuries resulting from defects therein, is entitled to and should have through its proper officers the entire control over it, and the exclusive right and power to regulate its grade, location and every act or thing relating to its condition.

SEC. 291. It will of course be understood, from what has already been stated, that any thing that operates as an obstruction to travel upon any part of a highway is a nuisance — as a gate across it,² a fence,³ a building,⁴ a ditch,⁵ or to deposit any thing therein, as ashes,⁶ sand,⁷ logs,⁸ or any thing except such as is permitted for building purposes, as has been heretofore stated. And any person who does thus obstruct any part of a highway, or interferes therewith, is liable for all damages that ensue in consequence thereof.⁹

SEC. 292. So, too, while a person may do any of these acts upon his own premises, outside of the limits of the highway, yet he has no right to make any erections or do any act in close proximity thereto, the natural effect of which is to frighten horses being driven over the highway, and if he does he is answerable in damages therefor as for a nuisance.¹⁰ In *Judd v. Fargo*, 107 Mass.

¹ *Hunt v. Rich*, 38 Me. 195; *Bateman v. Burge*, 6 C. & P. 391.

² *James v. Hayward*, Cro. Car. 184; *Greasley v. Codling*, 2 Bing. 263; *Bateman v. Burge*, 6 C. & P. 391; *Adams v. Beach*, 6 Hill (N. Y.), 271.

³ *Gregory v. Com.*, 2 Dana (Ky.), 417; *Kelly v. Com.*, 11 S. & R. (Penn.), 345; *Neff v. Paddock*, 26 Wis. 546.

⁴ *Stetson v. Faxon*, 19 Pick. (Mass.) 417; *Barker v. Com.*, 19 Penn. St. 412.

⁵ *Dygert v. Schenck*, 23 Wend. (N. Y.) 446; *Harlow v. Humiston*, 6 Cow. (N. Y.) 189.

⁶ *Rogers v. Rogers*, 14 Wend. (N. Y.) 131.

⁷ *Mould v. Williams*, 5 Ad. & El. 469.

⁸ *Harlow v. Humiston*, 6 Cow. (N. Y.) 189.

⁹ *Dygert v. Schenck*, 23 Wend. (N. Y.) 446.

¹⁰ *Judd v. Fargo*, 107 Mass. 264; *Jones v. R. R. Co.*, id. 261; *Moree v. Richmond*, 41 Vt. 435; *Foshay v. Glen Haven*, 3 Am. Rep. 74; *Hill v. New River Co.*, 15 L. T. (N. S.) 555; *Loubz v. Hofner*, 1 Dev. (N. C.) 185, drumming near highway; *R. R. Co. v. Barnet*, 59 Penn. St. 259, and *R. R. Co. v. Harmon*, 47 Ill. 298, reckless blowing of engine whistle; *Cole v.*

164, it was held that if a farmer or other person leaves any thing unreasonably by the side of a highway which frightens horses, it is a nuisance and he is liable for all damages occasioned thereby. In *Jones v. R. R. Co.*, 107 Mass. 261, the defendants had a derrick located upon their premises, the boom of which swung over the highway, and the plaintiff passing over the highway with his horses, while the derrick boom was hanging over it, his horses became thereby frightened and unmanageable, and ran away doing considerable injury to the plaintiff; it was held by the court that a derrick or any thing else thus located by a highway, the natural tendency of which is to frighten horses passing, is a nuisance, and renders the person placing and using it there liable for all damages.¹

SEC. 293. But it has been held that while it is a nuisance for a person to pile logs or place any other obstruction in a highway, that it is not unlawful to place them upon his own premises outside the limits of the highway, and that if they are so placed even though there is no fence, and a person passing over the highway accidentally drives his team upon them and is injured, the person so placing them there is not liable.²

SEC. 294. It is unlawful and an indictable and actionable nuisance for one traveler over a highway unreasonably to obstruct the passage of another, by constantly interposing his team as an obstacle. Every person must exercise his right of transit over a highway reasonably and with due regard to the rights of others. If a person driving a team behind another desires to pass, because he can make greater speed than the team in front of him, he has the right to do so if he can with safety, and any unreasonable obstruction of this right by the person in front of him, by tailing his team, as it is called, that is, driving in front of him, first on one side, then on the other, with the view and purpose of preventing his passage, is a nuisance. Of course in order to con-

Fisher, 11 Mass. 137, reckless discharge of gun; *Rowe v. Young*, 16 Ind. 312, reckless driving. In *House v. Metcalf*, 27 Conn. 631, it was held that a water wheel near to and in view of a highway, so as to frighten horses passing it, was a nuisance. *Dimmock v. Suffield*, 30 Conn. 129.

1. *Hardy v. Keene*, 52 N. H. 370. A pile of stones was held a nuisance. *Clinton v. Howard*, 42 Conn. 295. A steam engine on wheels passing along a highway is not. *Macomber v. Nichols*, 34 Mich. 212; 22 Am.

Rep. 522. But contra, see *Smith v. Stokes*, 4 B. & S. 84; *Harrison v. Leaper*, 5 L. T. (N. S.) 640. See, also, *Favor v. Boston*, etc., R. R. Co., 114 Mass. 350. See *Knight v. Goodyear Rubber Co.*, 38 Conn. 438, where a steam whistle on mill near highway was held a nuisance. In *Young v. New Haven*, 39 Conn. 435, steam roller left beside highway. See, also, *Watkins v. Redden*, 2 F. & F. 629, in which traction steam engine in highway was held a nuisance.

2. *Harlow v. Humiston*, 6 Cow. (N. Y.) 189.

stitute this offense it is necessary to establish such a state of facts as show that the defendant intentionally and purposely thus obstructed travel.¹

SEC. 295. Obstructions amounting to a nuisance may exist where there is no actual physical obstruction. Thus any thing which endangers the safety of persons lawfully passing over a highway, even though existing outside of the actual limits thereof, is a technical obstruction, and indictable as such. As the establishment of a manufactory for the manufacture of gunpowder, nitroglycerine, or any other explosive substance near a highway, or the erection and maintenance of a magazine for storing any such compounds near a public highway or street.² Or the maintenance of a house in a ruinous condition, which is liable to fall down near a highway.³ The assemblage of a large crowd near a highway for the purpose of shooting.⁴ To construct or keep any thing by the side of a highway or street the natural tendency of which is to frighten horses, or to erect any thing upon one's own premises that overhangs a highway or street so as to endanger the safety of those passing over the same.⁵ In *Grainger v. Finlay*, 7 Irish C. L. 417, the plaintiff brought an action against the defendant for damages sustained by him by reason of the defendant's having obstructed the highway by keeping a dangerous and vicious dog so near thereto that he could not safely pass. The court held that if the dog was of *dangerous* and *vicious* habits, and so *known* to be by the defendant, that the keeping of the dog so near the highway that the plaintiff could not safely pass was an actionable nuisance.

SEC. 296. Shade trees set in a street or highway without authority of law are a nuisance, but if they are permitted to remain for the period of twenty years, the law will presume that they were

¹ *Com. v. Temple*, 14 Gray (Mass.), 69; *Balting v. Bristol & B. R. R. Co.*, 3 L. T. (N. S.) 665; *Bolton v. Codler*, 1 Watts (Pa.), 360.

² *People v. Sands*, 1 Johns. (N. Y.) 78; *Wier v. Kirk*, 1 L. T. 76; *Myers v. Malcolm*, 6 Hill (N. Y.), 292; *Bradley v. The People*, 56 Barb. (N. Y.) 72; *Fillo v. Jones*, 2 Abb. (N. Y.) 121; *Ryan v.*

Copes, 11 Rich. (S. C.) 217; *Shearon v. Cheatham*, 1 Swan, (Tenn.) *ante*.

³ *Regina v. Watts*, 6 Salk. 357.

⁴ *King v. Moore*, 3 B. & Ad. 184.

⁵ *Jones v. R. R. Co.*, 107 Mass. 261; *Osborn v. The Union Ferry Co.*, 58 Barb. (N. Y. S. C.) 629; *Ayer v. Norwiche*, 39 Conn. 376; *House v. Metcalf*, 27 id. 631; *Dimmock v. Suffield*, 30 id. 179.

planted there by lawful authority.¹ So, too, the boughs of trees that overhang the traveled path of a highway are a nuisance, and may be cut off by those having the repair of highways in charge, but the trees cannot be cut, nor can branches thereof be cut, lest they should at a future time operate as an obstruction.²

SEC. 297. While the owner of the fee of a road or street may maintain trespass against any one who abuses the right of transit over it, yet, even he himself has no authority to do any thing upon or near the highway that interferes with its safe and convenient use for the purposes of public travel, and if he does he is just as answerable civilly or criminally therefor as though he was a stranger to the title. His rights, so far as the full enjoyment of the public easement is concerned, over the same, are in abeyance, and subject to the superior right of the public. Therefore in a case where the owner of the fee dug a ditch across a highway and erected a bridge over the same, it was held a nuisance, and he was held answerable in damages to one who was injured thereby. In such cases the highway is interfered with at the peril of one who does it, and no degree of care or skill will protect him from liability.³

SEC. 298. So, too, it is a nuisance to station a person upon a public street near a place of business, with a placard calculated to injure the business of one occupying a building thereon. And it would seem that this is true, even though the business is not respectable or lawful, and even though the person thus stationed there is stationed there by the officers designated by the statute to warn persons along the street against that very class of business.⁴ In *Spell v. Massey*, 2 Starkie, 559, it was held a nuisance to place a placard opposite to the plaintiff's house, indicating that it was a bawdy house.⁵ This is a sensible doctrine. That the legislature may provide penalties for any offenses against the people is not doubted, but that it may authorize irresponsible

¹ *Bliss v. Bull*, 99 Mass. 597.

² *Hawkins' P. C.*, ch. 76, §§ 48-50.

³ *Dygert v. Schenck*, 23 Wend. (N. Y.) 446; *Irvine v. Wood*, 51 N. Y. 151;

Irvine v. Fowler, 5 Robt. (N. Y. Sup. Ct.) 482.

⁴ *Gilbert v. Mickle*, 4 Sandf. Ch. (N. Y.) 357.

⁵ *Spell v. Massey*, 2 Starkie, 559.

officers or other persons to interfere with another's business upon the ground that it is unlawful, before the person has had an opportunity to be heard before a jury, is a power which the legislature does not possess. If it had the power, its exercise in this way would certainly be of questionable propriety. If a business is being carried on that is unlawful and punishable as an offense, it is the duty of one who would stop it, to arrest the offender and have him tried before a competent tribunal, and if there is not evidence against him sufficient to warrant his arrest and trial, there certainly is not the slightest excuse for interfering in this way to destroy his business.

SEC. 299. When a highway is once established as such by the action of proper public authorities, it does not cease to be such, even though unused for many years, until it has been discontinued by the proper authorities ; hence if a new road is built near an old one, and the travel is wholly diverted from the old road over the new one, yet, unless the old road has been regularly discontinued, it remains a highway, and neither the owner of the fee nor any other person can lawfully obstruct the same any more than he could the new road.¹

SEC. 300. So, too, it is a nuisance to pass over a highway with unwarrantable loads, or in such a way as to cut it up unreasonably, and impair its condition for safety and reasonable travel.² The reason for this is, that the highway is only designed for reasonable and ordinary use for the passage of persons and the transportation of property, and it cannot be regarded as a reasonable use of it to incumber it with loads of such extraordinary weight, that the soil thereof will be unreasonably cut up or rutted. Neither can the authorities be expected to provide ways for the carriage of such loads — hence there must be a limit to the weight of burdens permitted to be carried over it at a single load, for no individual necessity or convenience can be permitted to stand in the way of the public good.

¹ *Wetherhead v. Bray*, 7 Ind. 706; *State v. Duncan*, 1 McCord (S. C.), 404; *Allen v. Lyon*, 2 Root (Conn.), 213; *Thomas v. Sorrell*, Vaughn, 346; *Ward, Cro. Car.* 266; *Elkins v. State*, 2 Humph. (Tenn.) 543. ² *Hawkins' P. C.*, ch. 76, § 51; *Rex v. Egerley*, 3 Salk. 183.

SEC. 301. The carrying on of a noxious trade upon or near a highway, whereby the air is corrupted and rendered either unwholesome or materially offensive, is a public nuisance, and indictable as such, as the right of every person to free, pure air, extends as well to public places and thoroughfares, as to dwellings or places of business'. It is not necessary, in order to constitute a noxious trade a public nuisance, by reason of offensive vapors liberated thereby, that the vapors should be deleterious to health. It is sufficient if they are materially offensive, and render the use of that part of the highway within the sphere of its effects materially offensive or uncomfortable.¹

LEGALIZED OBSTRUCTIONS.

SEC. 302. Whatever is authorized by statute within the scope of legislative powers is lawful, and therefore cannot be a nuisance. But this must be understood as subject to the qualification, that when an act that would otherwise be a nuisance, is authorized by statute, it only ceases to be a nuisance so long as it is exercised within the scope of the power conferred. If those powers are exceeded, or exercised in another or different manner from that prescribed by law, it becomes a nuisance as to such excess and difference of their mode of exercise.²

SEC. 303. Whenever an act is authorized to be done in a highway or otherwise, that would otherwise be a nuisance, the person or company to whom such power is given is bound to exercise the right conferred upon him not only strictly within the provisions of the law, but also to exercise the highest degree of care to prevent injury to the persons or property of those who may

¹ *Rex v. Niel*, 2 C. & P. 485; *Rex v. White*, 1 Bur. 337; *Catlin v. Valentine*, 9 Paige's Ch. (N. Y.) 575; *Brady v. Weeks*, 3 Barb. (N. Y. S. C.) 157; *Prescott's Case*, 2 City Hall Recorder (N. Y. City), 161; *Com v. Upton*, 6 Gray (Mass.), 473.

² *Rex v. Neil*, 2 Car. & Payne, 485. In *State v. Witherall*, 5 Harring. (Del.) 508, the court say: "Any trade or business carried on in a populous neighborhood, or near a public road which produces

noxious or offensive smells to the annoyance of the public, is indictable as a common nuisance, even though the smells should not be deleterious to health. It is enough if they are offensive to the senses.

³ *Rex v. Morris*, 1 B. & Ad. 441; *Hughes v. Providence & Worcester R. Co.*, 2 R. I. 493; *Reg. v. Eastern Counties R. R. Co.*, 2 Ad. & El. 567; *Renwick v. Morris*, 3 Hill (N. Y.) 621.

be affected by their acts.¹ Hence, where a railroad company has been permitted to lay its track along or across a highway, it is bound to the use of every reasonable precaution to prevent injury to those passing along the highway, or crossing its track that is laid across the same, and if it fails to exercise a proper degree of care, not only such as is provided by statute, but also such as is rendered necessary by the character of the obstruction and its location, having reference to a like reasonable exercise of care on the part of those approaching the obstruction, it becomes a nuisance to the extent of injury to individual rights, and renders the company liable in damages for all the consequences.² In all cases where the legislature authorizes an act to be done that will be a nuisance, without providing means for its removal, it will be treated as having sanctioned all the consequences. But where there are two methods by which the authority can be exercised, by one of which the work will become a nuisance, and by the other it will not, that method must be adopted which will not create a nuisance.³

SEC. 304. In the case of *Moshier v. The Utica and Schenectady Railroad Co.*, 8 Barb. (N. Y. Sup. Ct.) 427, it appeared that on the morning of the 21st June, A. D. 1847, the plaintiff was leading his horse on the Mohawk turnpike, about a mile west of the village of Amsterdam, and going toward that village, he met a train of the defendant's cars drawn by a locomotive, and going west at the usual speed, whereby the plaintiff's horse became greatly frightened, reared up, and pitched and jumped about, and as the cars passed fell to the ground dead. The plaintiff held the horse by the head and did every thing in his power to quiet him. There was no fence or screen between the railroad and the turnpike. The railroad company were the owners of the turnpike and bound to keep it in repair and free from obstructions. The Mohawk Turnpike Company was chartered in 1800

¹ *Bordentown & So. Amboy Turnpike Co. v. Camden & Amboy R. R. Co.*, 2 Har. (N. J.) 314; *Rex v. Morris*, 1 B. & Ad. 441; *King v. The Morris & Essex R. R. Co.*, 3 C. E. Green (N. J.), 377; *Brand v. R. R. Co.*, 8 Barb. (N. Y. Sup. Ct.) 369; *Mayor of New York v. Bailey*, 2 Denio (N. Y.), 440; *Boss v. Litton*, 6

Car. & P. 407; *Hawkins v. Cooper*, 8 id. 473; *Wolf v. Beard*, 8 id. 373; *Angell on Carriers*, § 563.

² *Cooper v. N. B. R. R. Co.*, 35 Jur. 295.

³ *Lord Blantyne v. Clyde Nav. Co.*, 39 Jur. 257; 5 Macph. 508.

by an act of the legislature, and by the terms of the charter were bound to keep the road in repair.

The defendant's corporation was chartered by an act of the legislature, approved April 29, 1833. By the terms of this act the defendants were required to purchase the turnpike in question, and to assume all the liabilities and possess all the rights of the turnpike company in reference thereto, and so long as the same was used as a turnpike were to keep it in proper condition and repair. The action was referred and a report made in favor of the plaintiff to recover \$400, the value of the horse. In the supreme court the opinion was delivered by WILLARD, J., who said: "If the injury complained of was not the result of some wrongful act of the defendant, either of omission or commission, this action cannot be maintained. It was not wrongful for the defendants to propel their cars along their railroad by a steam engine, although steam as a motive power is not mentioned in their act of incorporation. Indeed, we know historically that the act incorporating the defendants could not have been passed at the session of 1833 if a steam engine had been in terms mentioned in the act, as the power by which the business of the company was to be conducted. It is, however, a "mechanical power" within the meaning of the charter, and was rightfully applied. Nor is there any evidence that the manner in which the defendants conducted the train on the morning when the disaster happened was unusual or manifested an inattention to the rights of others. The working of the engine and the progress of the train occasioned much noise. Although this may, under some circumstances, excite the most intense fear, it is esteemed in general a beneficent admonition to avoid danger. It is a part of the constitution of a steam engine that it should, when in operation, make a noise. An authority to use an engine is an authority to make a noise, whether it awakens fear or not. A train of cars that should move with entire silence through the valley of the Mohawk would occasion more mischief than if its approach was heralded by the noise of many engines. Indeed, the policy of the general act to authorize the formation of railroad corporations,¹ is to require a bell of thirty pounds to be kept ringing for

¹ Act of March 27, 1848; Laws of 1848, p. 221.

a quarter of a mile before the train crosses a road as a precaution against accidents.¹ The engineer is then required to add to the usual noise of the engine and the train, the noise of the bell, to which is not unfrequently added the noise of the whistle. The mere noise of the defendant's train in the abstract therefore affords no evidence of a culpable inattention to the rights of others. But it is not to be denied that there are times and places in which the noise of the locomotive and train is attended with the most distressing effects. Where the railroad and turnpike are parallel, and in immediate contiguity with each other, persons traveling on the latter with horse teams are sometimes exposed to imminent danger by the mere sight and noise of a moving train. It was, in part, in anticipation of this danger, and the necessity of guarding against it, that dictated the policy of requiring the defendants to purchase the turnpike and assume the liabilities of that corporation before they should be permitted to run cars upon their own road. They thus acquired the right of laying their track across and along the bed of the turnpike without an application to the chancellor for appraisers, but they were bound "to restore the road to its former state, or in a sufficient manner to not impair its usefulness.

If the taking a part of the bed of the turnpike for the track of the railroad, or the bringing the railroad into close proximity to the turnpike, renders it dangerous to persons standing with teams on the latter, and thus impairs its usefulness to the public, the defendants are bound either to remove the two roads farther from each other or to separate them by protecting guards. There is room enough in the Mohawk Valley for both roads, and it is for the defendants to see that they do not interfere with each other.

The referee must have found that the encroachment by the railroad upon the turnpike at the place of the disaster enabled the noise and sight of the train to frighten the plaintiff's horse, and thus to cause its death. The defendants, by not restoring the turnpike to its required width, and by omitting all other precautions against accidents, have disregarded the injunctions of the statute, and if that neglect of duty has been the proximate cause of the plaintiff's injury, as the referee must have found, he

¹ *Id.*, § 87.

was entitled to recover. The encroachment of the defendants upon the turnpike was a public nuisance for which any person sustaining a particular injury may recover.”¹

SEC. 305. It will be observed that the doctrine of this case is predicated upon the provision in the defendant's charter, that in taking the turnpike for its roadway it was bound “to restore the road to its former state, or in a sufficient manner not to impair its usefulness,” and that by bringing its track upon the turnpike it was bound to guard against such accidents by erecting proper screens, or, if these failed, they were bound to move either the turnpike or their track to a greater distance from each other, because they were bound to keep the turnpike in such a condition with reference to the railroad as “not to impair its usefulness.” That is, that the statute could not be construed as an authority for the defendants to do any act under their charter that would impair the usefulness of the turnpike, and that if they did, such acts were a public nuisance, and rendered them liable for all the damages that ensued therefrom. The rule of law laid down in this case must, of course, be understood as exceptional. It is a doctrine that arises out of the peculiar provisions of the charter, and is not applicable to any other class of cases.

A grant to construct a railroad without specific limitations or powers carries with it, by necessary implication, the right to use engines and cars upon the same, and to do any act thereon that is legitimately incident to the free and full exercise of such operations. If a horse upon a highway is frightened by the necessary noise of the train, or at sight of it, and dies from fright, or if it becomes unmanageable and destroys its owner's team, and even injures him, yet there is no liability upon the company, if the accident resulted from a reasonable exercise of the company's right.² But if the charter creating the company limited its right in such a way as was done in the act creating the defendant's company, then liability would attach, if they failed strictly to comply with the terms of their charter.

¹ *Lansing v. Smith*, 4 Wend. (N. Y.) 9; *Stetson v. Faxon*, 19 Pick. (Mass.) 147; 10 id. 388; 1 *Root* (Conn.), 362; 3 Vt. 529.

² *Rex v. Pease*, 4 B. & Ad. 30; *Rex v. Morris*, id. 441; *Bordentown & South Amboy Turnpike Co. v. Camden & Amboy R. R. Co.*, 2 Har. (N. J.) 314.

Sec. 306. The difference between the general doctrine applicable to such questions, and the special doctrine arising from the peculiar provisions of charters, will be perhaps better illustrated by the case of *Rex v. Pease et al.*, 4 Barn. & Ad. 30, than by any other case. That was an indictment against the defendants for operating a railroad by steam that ran along side the King's highway, in some places within five yards of each other, for the distance of about one mile from Stockton to Yarm. The *gravamen* of the charge in the indictment was that the defendants operated the engines upon the railroad in question by steam, and burned large quantities of coal and coke in the development of steam with which to propel said engines, and thus emitted large quantities of offensive smoke that filled the air flowing over said highway, and attached to said engines large numbers of cars loaded with coal, which were drawn over said railroad with great noise, force and violence; and did with said engines and cars, and the fires burning therein, exhibit terrific and alarming appearances, and made divers loud explosions, shocks and noises, making it dangerous for persons to pass over the highway with teams or otherwise. The indictment was tried by jury who returned a special verdict, which found the allegations charged in the indictment to be true, and also found that many accidents had resulted to persons passing over the highway with teams, by reason of the horses becoming frightened by the trains running upon the defendant's railroad. The verdict also found that the defendants used the most approved appliances in running their road; that they were duly organized as a company according to statute, and that their road was built and operated according to the provisions of the statute. It was also found that no screens or fences were erected between the railroad and highway to shut off the view of the trains passing over the railroad.

The case was heard in *King's Bench*, and PARK, J., in delivering the judgment of the court, among other things, said: "The case turns upon the meaning of the statute,¹ and the question is, whether that gives an authority to the company to use locomotive engines on the railway absolutely, or only with some implied qualification or condition that they should employ all practicable

¹ 4 Geo. 4, ch. 33, § 8.

means to protect the public against injury from them? And those means were on the argument, suggested to be, the altering of the course of the railroad, or the erection of fences or screens of sufficient height to exclude the view of the engines from the passengers on the highway. Now the words of the statute in question clearly give to the company the unqualified right to use the engines, and we are to construe provisions in acts of parliament according to the ordinary sense of the words, unless such construction would lead to some unreasonable result, or be inconsistent with or contrary to the declared or implied intention of the framer of the law, in which case the grammatical sense of the words may be extended or modified.¹ * * * * It is clear that the makers of this and the prior act had in view the construction of a railroad, with its branches, in a certain defined line,² which had been delineated on a map deposited with the clerk of the place, and from which line the road was not to deviate more than one hundred yards, and not into the grounds of persons not mentioned in the book of reference. The legislature, therefore, must be presumed to have known that the railroad would be adjacent for a mile to the public highway, and consequently that travelers upon the highway would, in all probability, be incommoded by the passage of locomotive engines along the railroad. That being presumed, there is nothing unreasonable or inconsistent in supposing that the part of the public which should use the highway should sustain some inconvenience for the sake of the greater good to be attained by other parts of the public, in the more speedy traveling and conveyance of merchandise along the new railroad.

Can any one say that the public interests are unjustly dealt with, when the injury to one line of communication is compensated by the increased benefit to another? So far is such a proceeding from being unreasonable, that it was held by the majority of the judges in *Rex v. Russell*, 6 B. & C. 566, that a nuisance was excusable at common law on that principle,³ and whether that be

¹ *Eyston v. Shedd*, Plowden, 463; Bacon's Abr., Stat. I.

² 1 and 2 Geo. 4, ch. 44, § 6, and 4 id. 4, ch. 33, § 3.

³ *Rex v. Russell* has been directly overruled in several cases, since decided by the same court.

the law or not, at least it is clear that an express provision of the legislature having that effect cannot be unreasonable.

It is true that the same object, that of giving one part of the public the benefit of the use of these engines, might have been effected without the same injury to the other part using the road, if the act had imposed on the company the obligation of erecting a sufficient fence or screen at their own cost; or had provided that the line of said road should be different at that place; but it is by no means necessary to imply such an obligation in order to make the statute reasonable and consistent, for it has been shown to be so without; and it is natural to suppose that if such a condition had been intended, it would have been particularly expressed.¹

SEC. 307. Thus it will be seen that legislative authority to do an act that may operate to obstruct travel upon a highway, either by an actual physical obstruction, or by rendering the travel over it dangerous and unsafe, is a complete protection so long as the authority is exercised reasonably and within the provisions of the act. But the right must be exercised with a reasonable regard to the safety of the public. Thus in *King v. The Morris & Essex R. R. Co.*, 3 C. E. Greene (N. J.), 397, it was held that the grant of a franchise to operate a railroad does not confer power upon the company to use engines so constructed as to throw out burning coals that may set fire to buildings along the line of the road. But the road must be so operated as to create the least damage to the public or individuals, and the franchise is conferred upon the implied understanding that the company will use such machinery as will produce the least injury to the rights of others, and their neglect to do so makes them liable as for a nuisance to each individual injured.

SEC. 308. In *Turnpike Co. v. The Camden & Amboy R. R. Co.*, 2 Harr. (N. J.) 314, it was held that a railroad company is liable for an abuse of its charter privileges, or for exercising them in an extraordinary and unlawful manner; and that where a company created an unnecessary disturbance with its engines, or

¹ *Rex v. Morris*, 1 B. & Ad. 441.

where it unreasonably blocked the streets and obstructed passage over the same, with its engines and cars, its acts were a nuisance for which it is answerable either at the suits of individuals or by indictment.

DEFECTS IN HIGHWAYS AS NUISANCES.

SEC. 309. For the communities, individuals or corporations, upon whom is imposed the burden of keeping a highway in repair, to permit the same to be out of repair so as to endanger the safety of persons or property passing over it, or so as seriously to interfere with convenient transit over the same, is a public nuisance at common law, subjecting the communities, persons or corporations, upon whom the duty of keeping it in repair is imposed, to indictment, and generally to damages at the suit of persons injured by reason of such defects or want of repair.

SEC. 310. In England the duty of maintaining highways is imposed upon the parishes in which they are located, unless by prescription or otherwise, the duty rests upon particular persons.¹ This liability is extremely stringent and so rigidly is it adhered to, that if the individuals upon whom the duty of making repairs rests by prescription become insolvent, or the divisions of parishes upon which the burden has formerly rested are exempted from this duty by statute, the common-law liability reattaches upon the parish.² Indeed, it has been held in an indictment against a parish for not repairing, that the fact that by a statute that was declared to be a public act, the duty of keeping certain streets in repair was imposed upon the commissioners for lighting and paving the streets of a city, the duty of keeping the streets in proper repair was no defense by the parish to the indictment, and that the parish could not be exempted from liability otherwise than by

¹ Katherine Austin's Case, 1 Ventris, 189. In Austin's Case, 1 Ventris, 183 the defendant was indicted for setting posts and rails in a highway. HALE, J., said: "If there be no special matter to fix it upon others, the parish where the highway is ought to repair it of common right."

² See note, 1 Ventris, 90, in which it is said that every parish of common

right ought to repair the highways and no agreement with any person whatever can take off this charge which the law lays upon them." Rex v. Mayor of Warwick, 2 Shower, 201; Rex v. Great Broughton, 5 Burrows, 270; Rex v. Rayley, 12 Mod. 409; Rex v. Stoughton, 2 Wm. Saunders, 159; Rex v. Ecclesfield, 1 B. & Ad. 348; Rex v. St Andrews, 1 Mod. 112.

express and positive enactment.¹ Lord ELLENBOROUGH said: "I think these acts are no answer to this indictment. They certainly do not expressly exempt the parish from the common-law liability to repair all highways within its limits. Do they create any exemption by implication? I think not. The duty of repairing may be imposed upon others, although the parish be still liable. The parish must, in the first instance, see that the street is properly paved and seek a remedy over against the commissioners."

SEC. 311. The parishes can only escape liability by showing that the highway is not out of repair, or by setting forth by plea that particular persons ought to repair, and how, and why they are so bound, and the plea must disclose such an obligation on the persons designated in the plea to repair, as will in judgment of law operate as a full legal excuse for non-repair on the part of the parish.²

SEC. 312. But while, by the common law in England, the parish is *prima facie* bound to make all repairs upon and keep all its highways in good condition, yet it may be relieved of this burden and the obligations imposed upon particular persons or districts of the parish in either of two ways. First, by an inclosure of the highway by the owner of the land next adjacent thereto, and second, by prescription. As to the first method, by enclosure of the highways, the transfer of liability to repair can not be effected, when the highway has not existed for a time beyond the memory of man, nor does it accrue where the assigning land was inclosed before the inclosure was used for passage.³ The reason for the transfer of liability is predicated upon the fact that when a highway becomes founderaus, and out of repair, or dangerous, or incommodious to travelers over it, the public have

¹ *Rex v. The Inhabitants of St. George Hanover Square*, 3 Camp. 222. See, also, to the same effect, *Rex v. Liverpool*, 3 East, 86; *Rex v. Scarisbrook*, 6 Ad. & El. 509; *Rex v. Neatherthong*, 2 B. & Ad. 179; *Parsons v. St Matthews Vestry*, etc., L. R., 3 C. P. 56; *Rex v. Sheffield*, 2 T. R. 108; *Rex v. Exfordshire*, 6 B. & C. 194; *Anonymous*, 1 Ld. Raym. 725.

² *Rex v. Great Broughton*, 5 Burrows.

2700; *Rex v. Pendernym*, 2 T. R. 573; *Regina v. Medville*, 4 Ad. & El. (N. S.) 240; *Rex v. Stoughton*, 2 Wm. Saunders, 159; *Little Bolton v. Regina*, 12 L. J. (N. S.) M. C. 104; *Rex v. St. Andrews*, 2 B. & C. 190; *Regina v. Fryden*, 10 Eng. Law & Eq. 402; *Regina v. Nether Hallam*, 27 id. 200.

³ *Regina v. Ramsden*, 1 Ellis, B. & E. 949.

a right to pass upon the adjacent land, even though it is sown,¹ and when the land is inclosed, the public is deprived of this right, and hence the law imposes upon him who incloses the land, the duty of keeping the highway in good repair and condition at all times; as, if the inclosure was not made, the public, in case of non-repair, could go upon the adjacent land.² The liability to repair under this condition of things is imposed upon the occupant of the lands, and not upon the owner, as it is a charge upon the land that attaches to those in occupancy. And as the liability is created by the inclosure, so it can at any time be determined by removing the fences and leaving the highway uninclosed.³ If a highway has been anciently inclosed on one side and the occupant of the lands inclose one side, he is bound by this act to keep the whole way in repair, because by the fencing of the other side for so long a time, the public have acquired the right to go upon the lands on the other side when the way is foundurous, and as the right is cut off by the fencing of that side also, he ought to repair the whole way. But if he fences one side only, then he is only liable to repair one-half the way.⁴

If the inclosure is made under authority of an act of parliament for dividing and inclosing open fields, the person inclosing is not bound to repair, unless upon writ of *ad quod damnum* such a condition is imposed.⁵

SEC. 313. The liability to repair by prescription cannot be imposed upon individuals, except it arises out of the tenure of the land, for the acts of an ancestor, however long continued, cannot bind his heirs to perform similar acts unless it is predicated upon some profit that arises out of the land in consequence thereof, either in the form of toll or other profit. This must exist as a consideration so to speak for the performance of the obligation,⁶ and if the parish is indicted for non-repair, if it seeks to avoid the

¹ 3 Rolle's Abr. 390, A. pl. 1, & B. pl. 2; Taylor v. Whitehead, Davy, 749; Absor v. French, 2 Shower, 28.

² Dunscombe's Case, Cro. Car. 366; Rolle's Abr., B. pl. 1.

³ Rex v. Stoughton, 2 Wm. Saunders, 160.

⁴ Rex v. Stoughton, 2 Wm. Saunders, 16; Hawkins' P. C. 76, § 7.

⁵ Rex v. Llandillo, 2 T. R. 232; Rex v. Fleckman, 1 Bur. 465; Ex parte Vernon, 3 Atk. 771.

⁶ Trevian v. Lawrence, 1 Ld. Raym. 1051; Speake v. Richards, Hol. 206; Magrath v. Hardy, 4 Bing. (N. C.) 782; Armstrong v. Norton, 3 Ir. Rep. 100.

liability by showing a prescriptive right imposed upon some individual to make the repairs, it must not only set up the immemorial usage, but it must also show that the usage is predicated upon a liability *ratione tenuræ*. In *Regina v. Blackmore*, 9 Eng. Law & Eq. 541, the defendant was indicted for not repairing certain divisions of two highways, for the division of Ford. Evidence was given upon the trial of the conviction of a former owner and occupant of the lands in respect to which the liability was said to arise, for the non-repair of the same highway, as well also as repairs made by other occupants subsequent to the conviction, and that the defendant purchased the lands after public notice of this liability to repair. The defendant was convicted, and upon hearing in the court of criminal appeals, PARKE, B., said: "I think the conviction is right. The question is, whether there was evidence to go to the jury of the defendant's liability to repair the road *ratione tenuræ*; and I am of opinion that there was, and that the conviction of the former owner operates as an estoppel." Where a corporation aggregate has been used to make repairs so that the obligation upon it has become fixed by prescription it is sufficient to show that "it ought and hath used to do it," and it is not necessary that it should be shown to stand on any tenure of lands. Its liability rests upon the naked ground that it shall be presumed to be bound to do what it has always done."¹

Angell says on page 294 of his work on Highways, "that this liability ought properly to be considered as originating in a custom rather than a prescription. "For," he adds, "a prescription ought to have by common intendment a lawful beginning. A custom may be good although the particular reason of it cannot be assigned, for it suffices if no good reason can be assigned against it." It would seem from the authorities that so far as the liability of corporations are concerned to make repairs, it is sufficient to establish the custom,² but as to individuals, the liability depends

¹ 2 Angell on Highways, 293; *Rex v. Stratford on Avon*, 14 East, 348; *Rex v. Gloucester & Birmingham Railway Co.*, 9 C. & P. 469; 1 Hawkins' P. C., ch. 76, § 8; ch. 77, § 2.

² *Rex v. Great Broughton*, 5 Burrows, 2710; *Regina v. Burnoldswick*, 4 Ad. & El. (N. S.) 499; *Rex v. Hatfield, Barn. & Ald.* 75; *Rex v. Ecclesfield*, 1 id. 348.

wholly upon prescription, and cannot be sustained unless there is a consideration so to speak underlying it.

SEC. 314. The prescriptive liability to repair only extends to the old way. If a new way is established, or if the old way is enlarged, the liability to repair is not extended beyond the old way. The occupant is not bound to repair the new way, nor the part of the old way so enlarged. All excess is to be repaired by the parish.¹

SEC. 315. Where a land owner is bound to repair a highway *ratione tenuræ*, it is said to be doubtful whether an action can be maintained against him by the person who has sustained damage by reason of the road being out of repair. But it has been held that the lord of a manor may have an action under a prescription that he and all who had his estate had a right to have a bridge kept in repair by the owner of a mill.²

SEC. 316. The repair of all bridges in England is *prima facie*, whether foot, horse or carriage bridges, by the common law imposed upon the inhabitants of the county, unless as in the case of highways they can show that the liability rests upon others. The liability of a county in every respect rests upon the same ground as that of parishes to repair highways.³ But the bridge must be public.⁴ In Bacon's Abr. 368, tit. Bridges, pl. 2, there is an exception to this liability named. "If," says the author, "a man erects a mill for his own profit, and make a new cut for the water to come to it, and make a new bridge over it, and the subjects used to go over this as over a common bridge, this bridge ought to be repaired by him who has the mill, and not by the county, because he erected it for his own benefit." But if a man builds a bridge for his own private convenience, and the public also use it, whereby it becomes useful to the public, the public ought and must maintain it.⁴ There is still another

¹ *Rex v. St. Pancras, Peake*, 286; *Rex v. Townsend*, 12 East, 368.

² *Young v. Davis*, 31 L. J. Exch. 254; 11 Hen. 4, ch. 28, p. 83.

³ *Regina v. Southampton*, 14 Eng. Law and Eq. 116; *Rex v. W. R. of*

Yorkshire, 5 Burrows, 2596.

⁴ *Id.*

incident essential in order to cast the repairs upon the county rather than the parish, and that is that it must be erected over waters that are properly "*flumen vel cursus aquæ*;" that is, water flowing in a channel between banks more or less defined.¹ Thus it was held in *Rex v. The Inhabitants of Oxfordshire*, 1 Barn. & Ad. 287, that where the road by which a bridge was approached passed between meadows which were occasionally flooded by a river, and for a convenient access to the bridge a raised causeway had been made having arches or sluices at intervals, for the passage of the flood water, which were equally necessary to the safety of the main bridge and the causeway. It was held that the inhabitants of the county were not bound to repair the arches because there was no water answering to the description, "*flumen vel cursus aquæ*."

SEC. 317. In the United States there is no common-law obligations of maintaining or repairing either highways or bridges. Such obligations are raised and imposed by special statutes in each of the States, and these obligations thus imposed by statute do not vary essentially from the common-law rule, except as to the communities upon which the burden is cast, and a higher degree of stringency as to the care to be exercised over such highways, and where any liability exists at all, or more extended liability for injuries resulting from want of repair. But this obligation to repair being strictly statutory, and where no such obligation is expressly or by fair implication imposed by statute, no private remedy exists.²

SEC. 318. In some of the States the several towns are charged with the duty and expense of keeping their highways in repair,³ and frequently are invested in the first instance with the power

¹ Bridges and Nichols Case, Godb. 346; Vin. Abr., Bridges, B. pl. 13; Rex v. The Inhabitants of Oxfordshire, 1 B. & Ad. 289; Rex v. Trafford, id. 874; Rex v. Whitney, 4 Nev. & M. 594.

² Morey v. New Fane, 8 Barb. (N. Y. S. C.) 645; People v. Commissioners of Highways of Hudson, 7 Wend. (N. Y.) 474; Riddle v. Proprietors, etc., 7

Mass. 169; Chidsey v. Canton, 17 Conn. 475; Bigelow v. Randolph, 14 Gray (Mass.), 541; Reed v. Belfast, 20 Me. 246; Ball v. Winchester, 32 N. H. 433; Tallahassee v. Fortune, 3 Fla. 19; State v. Murfreesboro, 11 Humph. (Tenn.) 217; Commrs. v. Martin, 4 Mich. 557.

³ Vermont, New Hampshire, Maine, Massachusetts, Connecticut, Rhode Island, Wisconsin.

of laying out and constructing new roads, altering old ones, or discontinuing them altogether, in accordance with the provisions of the statute, and are also made liable in damages for all injuries arising from want of repair, while in others liability depends upon a special state of facts.¹

¹ In Alabama by the Code (§ 1203) a remedy is given on the bond of the builders of highways for all injuries. If there is no bond the county is liable; and by section 1175 of the Code the corporate officers of incorporated towns and cities are indictable for a misdemeanor, if streets are out of repair more than ten days, and this statute is held to apply as well to free as to toll bridges. *Barber County v. Brunson*, 36 Ala. (N. S.) 362. In Arkansas each overseer of roads must cause all roads in his district to be kept well cleared and in good condition. Rev. Stat. 130, § 12. In California the road-master of each town is required to keep all roads in as good repair as the means at his command will permit. 2 Gen. Laws 653, § 15.

In Delaware, by Rev. Code, 178, § 32, an overseer is, if there be funds in his hands for that purpose, deemed guilty of a misdemeanor if he willfully allows the public roads or bridges to be out of repair. In Georgia by statute (Cobb's Ga. Stat. 500, § 4, 504, 3, 6,) overseers are required to cause the roads to be well worked and repaired, and for neglect to do so are subject to a fine and action for damages for all injuries arising from such defects. In Illinois each supervisor, by 1 Ill. Rev. Stat. 562, § 14, is charged with the duty of causing all the roads in his district to be kept well cleaned, smooth and in good repair, and is liable to indictment for failure to do so. In Indiana the same statute in effect exists, but no action for damages can be brought against the supervisor, but he is subject to indictment for a failure to properly discharge his duty. By Iowa Laws, 144, 902, liability for damages for defects in highways arises, if after notice in writing of the defect in any highway or bridge he shall not in a reasonable time repair the same, and generally he is required to keep all highways in a good passable condition. In Maryland (by 1 Rev. Code, p. 610, § 1, 15, 17)

provision is made for the election of supervisors to take charge of and direct repairs of the public roads, and keep them clear of obstructions, and for neglect and malfeasance are made liable to indictment and fine. In Michigan (1 Compiled Laws, 340) commissioners of highways are provided for who have the general oversight over all highways and bridges in their towns, and are required to give directions to the overseers for the repair of the same and how it shall be done. There are, however, certain general duties that the overseer is required to perform without directions from his superiors. The commissioners are liable to indictment for neglecting to cause the roads and bridges to be kept in proper repair, but not unless they have funds in their hands for that purpose, and an indictment should affirmatively state that they have funds, etc. In Mississippi (1 Hutch. Miss Code, 253, chap. 9, art. 7) the overseers of roads and bridges are liable to fine if without good cause they neglect for the space of ten days to put any road or bridge that is out of repair in proper repair. In Missouri (Gen. Stat. 266, § 46) overseers are made liable for willful neglect to repair, and are liable for all damages arising from neglect to repair after notice, or to fine, if they have funds for that purpose unexpended.

In New Jersey (Nixon's Dig. 706, §§ 21, 43) overseers are required to keep the highways in good order, to work, clear out and amend the same, while the townships, or board of county freeholders, are chargeable with the duty of repairing all bridges, and are liable in damages for all injuries that result from their neglect, the judgment to be paid by the township or county as the case may require. (Nixon's Dig. 74, § 18.) In New York by statute (1 Rev. Stat., pp. 501-504) the commissioners of highways are given the general supervision of all highways and are required to direct as to what repairs, and how

But it is not important for the purposes of this work to consider what communities, corporations or individuals are liable to keep highways in repair. These are matters that are provided for by the statutes of the several States, and where, in a given State, a highway is defective in any respect, so as to endanger the safety of public travel over it, the statute readily points to the party liable to respond either civilly for damages sustained thereby, or by indictment at the suit of the people. We have only to deal with the question, as to what are to be deemed defects in highways, for it is only defective highways, defective in construction or repair, that come within the purview of a work on nuisances. But it will be seen by reference to the note (2), *ante*, that the highway system in this country is extremely diverse, and in many instances is so loose and irresponsible, that in some of the States the cause for surprise is, not that they have so many poor roads, but, that they have any roads at all. Highways are of some importance to every community, and it would almost seem that that is the best policy, which requires good roads to be made, and holds the towns or communities up to the strictest degree of liability for their insufficiency or defectiveness.

they shall be made, and the overseers are to make all repairs under their direction, except that the overseers are required to perform certain general duties without direction. Thus in *McFadden v. Kingsbury*, 11 Wend. (N. Y.) 667, it was held that overseers were bound to keep the highways in repair whether they were instructed to do so by the commissioners or not. The overseer is liable to indictment for willful neglect to keep the roads in repair under 2 R. S. 696, § 38, but they are not bound to repair unless they have been provided with funds for that purpose, consequently are not liable for damages that arise from want of repair, nor to indictment unless they have the requisite funds provided by the public. They are not bound to use their own funds, nor to repair until funds have actually been supplied to them. In North Carolina, by chap. 101, p. 537, § 21, overseers of highways are required to keep their highways and bridges in repair, and free from obstruction, and if they neglect

to do so they are liable for such damages as may be sustained.

In Ohio, by 2 Rev. Stat. 1216, § 40, the supervisors are subjected to a fine for neglect to discharge their duties in reference to highways and bridges. In Pennsylvania (*Dunlap's Laws*, 646, § 42) supervisors are to keep the highways in constant good repair and free from obstructions, and are liable to indictment for neglect, and an action lies against a township for injuries sustained from defect in the highways. In South Carolina a penalty is imposed for the neglect of commissioners to repair roads and bridges under their control, under the statute of 1825. In Tennessee the towns are held liable for want of repair of their roads and bridges. *Hill v. State*, 4 Sneed (Tenn.), 443; *State v. Barksdale*, 5 Humph. (Tenn.), 154. In Virginia, by Gen. Stat. 1860, p. 303, ch. 52, § 34, the surveyor of highways is made liable to a fine of not less than \$5 nor more than \$30 if he neglects to keep the roads in proper condition and free from obstructions.

SEC. 319. It may be regarded as well settled that a highway or bridge that from any cause is rendered unsafe for the ordinary purposes of public travel is indictable as a nuisance, and that the town, city or other municipal, or (as in the case of turnpike roads) private corporation or individual, upon which or whom the statute imposes the power to control, and the duty to repair the same, is generally liable at the suit of individuals for all damages resulting from such defects. The ordinary business of the country requires that its roads and streets should at all times be safe and convenient for the purposes of ordinary transit over them; hence, a more than ordinary degree of vigilance is required in that respect.

SEC. 320. But there is a distinction made between streets and highways in different localities. A great thoroughfare over which a large number of persons and teams are passing each day, and which connects important points, requires a much higher state of repair, and a higher degree of care and watchfulness on the part of those having it in charge, than a highway in a thinly settled section of country, and that is but little used.

This distinction is suggested by common sense, and is recognized by the courts.¹ Therefore, it is always proper for the jury to take into consideration the geographical condition of the country, the nature of the soil, the grade, the ordinary uses to which the highway is applied, as elements in determining whether or not a highway is in proper condition and repair. In the case of *Hull v. Richmond*, 2 Woodb. & M. (U. S.) 337, WOODBURY, J., said: "If a road is on a steep mountain side, or is carried up from the bed of a stream against a steep cliff of rocks or through a narrow gorge or notch among the hills, a double track would seldom be expected, though places should be made at no great distances for persons to turn out entirely, and others, where, by each turning out in part, each could safely pass. Some of these distances, like the Jew's leap in Africa, or the Notch of the White Hills, or some modern tunnels, might be so far apart as to require a horn

¹ *Hull v. Richmond*, 2 Woodb. & M. (U. S.) 161; *Laker v. Brookline*, 13 Pick. (U. S.) 337; *Church v. Cherryfield*, 33 Me. (Mass.) 343; *Drake v. Lowell*, 13 Metc. 460; *Witz v. Boston*, 4 Cush. (Mass.) 365; (Mass.) 292; *State v. Beeman*, 35 Me. Richardson v. Royalton Turnpike Co., 242. 6 Vt. 46; *Providence v. Clapp*, 17 How.

to be blown, or a loud halloo made to apprise others at the other end to wait. Some of them, where the road was straight, might be seen by common observation, and all that can be reasonably required in such localities is, that the road shall be adapted to the state of the country, the amount of travel over it, and its ordinary uses."

SEC. 321. As to what constitutes a defect is in many instances a mixed question of law and fact, depending upon a variety of conditions that vary with the circumstances of each case, and which come within the province of a jury under proper instructions from the court.¹ On the other hand there are a species of defects that are nuisances *in se*, and the mere existence of which render the highway indictable, and which subject the town, corporation or individuals upon whom, under the law, the duty is cast to keep the highway in proper repair, liable for all the damages that result therefrom.¹

SEC. 322. The obligation imposed by the law is to keep the roads in good repair, and it is no defense either to an indictment or action, that ordinary care has been used by the town in repairing and keeping them in a safe condition. The obligation is to make them safe and convenient for the purposes of public travel, and this must be done at all hazards.² That degree of care and attention required in this respect has been said to be such as a discreet and cautious individual would or ought to use if the risk was his own, and should be measured by the magnitude of the injury likely to occur from its omission.³ And the obligation is absolute and imperative, and cannot be avoided by reason of the pecuniary or other inability of the town or corporation.⁴

SEC. 323. It will of course be understood from what has previously been stated, that a town or municipal corporation upon which rests the burden of keeping its highways in repair, is not

¹ Green v. Danby, 12 Vt. 388; Fitz v. Boston, 4 Cush. (Mass.) 365; Merrill v. Hampden, 26 Me. 234; Kelsey v. Glover, 15 Vt. 708; Rice v. Montpelier, 19 id. 470.

² Horton v. Ipswich, 12 Cush. (Mass.) 488.

³ City of Madison v. Ross, 3 Ind. 36, Chicago v. Mayor, 18 Ill. 349

⁴ Winship v. Enfield, 42 N. H. 197; Erie City v. Swingle, 22 Penn. 34.

liable for any defects therein until the highway has been regularly adopted or established as such.¹ Neither is it liable for any defects either in a highway or bridge that has been laid out without authority, although mere irregularities in the laying out or establishment of the road will not prevent liability attaching to keep the road in proper repair.² No formal adoption is necessary. If the highway has been used as such, and repaired and recognized by the proper authorities as a highway,³ it becomes so to all intents and purposes. Although there are exceptions to this rule, as where the repairs have been made under a mistaken idea of its liability to repair, or when the duty of repairing belongs to an individual or some other town.⁴

SEC. 324. The law requires that highways and streets shall be kept in a safe and proper condition for public travel and free from any defects that render passage over it unsafe or inconvenient for the public. As to the precise degree of liability for defects in a highway, no definite rule can be given that is applicable to all cases, but it may be stated as a general proposition, that any defect that impairs the safety of the highway for the purposes of travel, or essentially interferes with its convenient use, is an indictable and actionable nuisance, at common law.⁵ As a rule, those defects only are actionable, which are indictable at common law as nuisances;⁶ but all obstructions of highways or defects rather, that are indictable as nuisances, do not furnish the basis for an action against the town.⁷

¹ *State v. Price*, 21 Md. 449; *Jones v. Andover*, 9 Pick. (Mass.) 146; *Page v. Wethersfield*, 13 Vt. 424; *St Paul v. Seitz*, 3 Minn. 297; *Milwaukee v. Davis*, 6 Wis. 377; *Haywood v. Charlestown*, 43 N. H. 61; *Perrine v. Farr*, 2 Zab. (N. J.) 356; *Runy v. Shonberger*, 2 Watts (Penn.), 23; *State v. Randall*, 2 Strob. (S. C.) 110.

² *Hyde v. Jamaica*, 27 Vt. 443; *Indianapolis v. Jackson*, 2 Ind. 147; *Haywood v. Charlestown*, 43 N. H. 61; *Sampson v. Goochland*, 5 Gratt. (Va.) 241.

³ *Milwaukee v. Davis*, 6 Wis. 377; *Folsom v. Underhill*, 36 Vt. 580; *Cadner v. Bradford*, 2 Chand. (Wis.) 291; *Kellogg v. Northampton*, 8 Gray (Mass.), 504.

⁴ *State v. Alburgh*, 23 Vt. 263; *Proctor v. Andover*, 42 N. H. 362; *Reed v. Cornwall*, 27 Conn. 48.

⁵ *Cogswell v. Lexington*, 4 Cush. (Mass.) 307; *Harrison v. New Haven*, 34 Conn. 135; *Davis v. Bangor*, 42 Me. 592.

⁶ *Merrill v. Hampden*, 26 Me. 234; *Howard v. North Bridgewater*, 16 Pick. 189.

⁷ *Harrison v. New Haven*, 34 Conn. 136; *Hixon v. Lowell*, 13 Gray (Mass.), 59; *Fisher v. City of Boston*, 6 Am. Rep. 196; *In. Jones v. Boston*, 6 Am. Rep. 194, it was held that no action would lie against a city for injuries occasioned to a traveler caused by the falling of a sign projecting over the sidewalk and insecurely fastened, by

The reason is apparent. An act may be done by the owner of lands adjoining a highway, that seriously impairs its safety. As by the erection or placing some object there, that is calculated to frighten horses,¹ or by the erection of a building so that the eaves project over the highway and endanger the safety of those passing along the street, from the accumulation of ice and snow thereon;² the erection of an insecure building on the line of a public street and a multitude of other things over which the authorities have, and can have, no control. The distinction arises here. For injuries resulting from any obstructions in the highway itself, and over which the proper authorities have lawful control, and which they can lawfully remove, however they come there, the town or city is liable. But, when the injury results from something outside the limits of the highway, upon lands which the authorities have no authority to enter upon, the individual making or continuing the erections or obstructions, alone is liable. He may be indicted for maintaining a public nuisance, and made to respond in damages to those injured thereby.³ But it would be highly inequitable to hold the

the proprietor of the building to which it was attached, even though the insecure condition of the sign and the fact of its projection over the street had been brought to the attention of the city authorities. The liability rests upon the owner. *Taylor v. Peckham*, 5 Am. Rep. 578. In *Drake v. Lowell*, 13 Metc. (Mass.) 292, it was held that the city was liable for injuries sustained by the plaintiff by reason of the falling of a defective awning projecting over and across the sidewalk and supported by posts at the curbstone. See also *Day v. Milford*, 5 Allen (Mass.), 98. But in *Hixon v. Lowell*, 13 Gray (Mass.), 59, it was held that the city was not liable for an injury received by the fall of snow and ice from a building whose roof projected over the sidewalk. *Macomber v. Taunton*, 100 Mass. 255.

¹ *Foshay v. Glen Haven*, 3 Am. Rep. 73; 25 Wis. 288, is a case where the plaintiff's horses were frightened by a "hollow burnt and blackened log lying close to the traveled part of a highway and within its limits." In this case it was held that the log being within the highway limits, and being

naturally calculated to frighten horses, the town is liable. *Judd v. Fargo*, 107 Mass. 234.

² *Hixon v. Lowell*, 13 Gray (Mass.), 59; *Barber v. Roxbury*, 11 Allen (Mass.) 318.

³ In *Shepley v. The Fifty Associates*, 101 Mass. 251, the plaintiff sustained injuries from the falling of ice and snow upon him while passing along the street, from the roof of the defendant's building, which was a pitch roof and extended over the street, it was held that the roof was a nuisance and that the defendants were liable for the injuries sustained. In *Jones v. Railroad Company*, 107 Mass. 261, it was held that where a railroad company erected a derrick upon their own premises, the boom of which projected over the highway, and which was used by them in loading their cars, is a nuisance, and the defendant was held liable to the plaintiff by reason of damages sustained by him by his horses becoming frightened at the derrick while in operation, and escaping.

In *Judd v. Fargo*, 107 Mass. 234, it was held that the defendant, who was a farmer, was liable for placing any

town liable for injuries resulting from something over which they have no control, and which they cannot remove any more than any other citizen.

SEC. 325. The numerous annoyances, inconveniences and dangers to which a person may be subjected upon a highway, without redress against the city or town, were well illustrated by the court in the case of *Hixon v. Lowell*, 13 Gray, *supra*. "The traveler," said the court, "may be subjected to inconvenience and hazard from various sources, none of which would constitute a defect or want of repair in the way for which the town would be responsible. He may be annoyed by the action of the elements; by a hail storm, by a drenching rain, by piercing sleet, by a cutting and icy wind, against which, however long continued, a town would be under no obligation to furnish him relief. He might be obstructed by a concourse of people, by a crowd of carriages; his horse might be frightened by a discharge of guns, the explosion of fire-works, by military music, by the presence of wild animals; his health may be endangered by pestilential vapors or by the contagion of disease, and these sources of discomfort and danger might be found within the limits of the highway, and yet that highway not be in any legal sense defective or out of repair. It is obvious that there may be nuisances upon traveled ways for which there is no remedy against the town which is bound by law to construct and maintain the way. If the owner of a distillery, for example, or of a manufactory adjoining the street of a city, should discharge continuously, from a pipe or orifice opening toward the street, a quantity of steam or hot water, to the nuisance and injury of a passer by, they must certainly seek for redress in some other mode than by an action for a defective way. If the walls of a house adjoining a street in a city were erected in so insecure a manner as to be liable to fall upon persons passing by, or if the eaves-trough or water-conductor was so arranged as to throw a stream from the roof upon the sidewalk, there being in either case no structure erected within or above the traveled way, it would not constitute a defect in the way."

thing upon the side of a highway unreasonably, that was calculated to frighten horses, and which in this instance did frighten the plaintiff's horses whereby they escaped.

SEC. 326. The town is only responsible for defects in the highway. It is never responsible for injuries caused by any thing outside the limits of the highway. But it is its duty to keep the highway itself in a constant state of repair, and to see that no obstructions are therein, and nothing there calculated to endanger the safety of persons traveling over it either on foot or with teams, and this applies as well to the space outside the traveled way and within the highway limits as to the traveled path itself. The town is not bound to work the whole space within the highway limits, but it is bound to keep it clear of obstructions, dangerous excavations or any thing that may in any manner jeopardize the safety of the traveling public.¹ In the case of *Morse v. Richmond*, 41 Vt. 435, STEELE, J., said: "It is well settled that it is the duty of towns to forbid and prevent the use of their highway margins as places of deposit for private property, whether it be lumber, shingles, logs or other matter that may interfere with travel; and if they do negligently suffer the margins to become and remain unsafe by being thus incumbered, the party who, without fault on his part, meets with an accident by driving against them, may recover of the town."

SEC. 327. A traveler may use the margin of the road if he chooses to do so, but if he goes there unnecessarily, and from mere caprice, he cannot recover for injuries sustained while traveling there.² But if he is forced there from any cause, or if in traveling along the road in the night his horse accidentally goes there, and by reason of any obstructions or defects, he sustains an injury, the town is liable therefor.³ Logs, stones, and large accumulations of snow or ice even, that endanger public travel, are such defects in the highway as make the town answerable in

¹ *Johnson v. Whitfield*, 18 Me. 286; *Rice v. Montpelier*, 19 Vt. 470; *Bryant v. Biddlefield*, 39 Me. 193; *Packard v. Packard*, 16 Pick. (Mass.) 191; *Siddans v. Gardner*, 42 Me. 248. In *Johnson v. Whitfield*, supra, SHEPLEY, J., says: "To allow the side of the road to be incumbered by logs or other things unnecessarily placed there, would deprive the citizens of the whole width of the way, or subject them to unnec-

essary dangers not contemplated by law." *Snow v. Adams*, 1 Cush. (Mass.) 443; *Bigelow v. Weston*, 3 Pick. (Mass.) 267.

² *Willy v. Portsmouth*, 35 N. H. 303; *Barton v. Montpelier*, 30 Vt. 650; *Seward v. Milford*, 21 Wis. 485.

³ *Cassady v. Stockbridge*, 21 Vt. 321; *Rice v. Montpelier*, 19 id. 470; *Dickey v. Maine Tel. Co.*, 46 Me. 483.

damages for any injuries resulting therefrom.¹ So, too, as has previously been stated, the town is bound to remove any thing from the limits of the highway, no matter by whom deposited there, that operates either as an actual obstruction, or that is calculated to endanger the safety of those passing over the roads with teams, because of its tendency to frighten horses.² And as illustrative of the rule that prevails in such cases, the case of *Dimmock v. Suffield*, 30 Conn. 129, is in point. In that case the plaintiff sought to recover for injuries sustained by his horses by reason of their becoming frightened at some white plastering on the side of the road. It appeared that the plastering did not in any manner *obstruct* the road, and the only claim made in the case was, that it was calculated to frighten horses, and did frighten the plaintiff's horses so that they became unmanageable and ran away, sustaining considerable injury. HINMAN, J., in delivering the opinion of the court, said: "The liability of the town depends upon the fact whether the plaster was in its general operations calculated to frighten horses of ordinary gentleness. There can be no doubt that a road may be rendered unsafe by objects upon it calculated to frighten horses, but whether a slight discoloration by the side of a road, such as was caused in this case by the plastering that lay there, was in fact an object calculated to frighten horses, which are usually gentle, and therefore fit to be driven, is an entirely different question." The rule is that the object must be such as is calculated to frighten horses of *ordinary* gentleness, and in this case it appeared that the horse was shy and skittish,

¹ *Cogswell v. Lexington*, 4 Cush. (Mass.) 307; *Bigelow v. Wiston*, 3 Pick. (Mass.) 267; *Barton v. Montpelier*, 30 Vt. 650.

² *Littleton v. Richardson*, 32 N. H. 59; *Winship v. Enfield*, 42 id. 199; *Chamberlain v. Enfield*, 43 id. 358; *Dimmock v. Suffield*, 30 Conn. 129; *Roy v. Manchester*, 46 N. H. 59; *Hunison v. New Haven*, 34 Conn. 136; *Bartlett v. Hacksett*, 48 N. H. 18. In *Darling v. Westmoreland*, 52 N. H. 403, the plaintiff was passing a bridge when his horse became frightened at a pile of lumber lying by the roadside, and ran back and backed off the bridge. The court held that if the horse was frightened at the pile of lumber, and it was such as was calculated to

frighten horses, the town was liable and that it was competent, for the purpose of establishing this fact, to show that other horses in passing the lumber were, or were not frightened. In *Davis v. Leominster*, 1 Allen (Mass.), 818, it was held that the town was liable for an injury received by the plaintiff from a lot of sleepers placed in the highway covered by the location of a railroad, by those engaged in working upon the railroad. The ground of the recovery was predicated upon the fact that the town could have removed the sleepers without interfering with the authorized construction of the railroad, and were bound to do it. *Phillips v. Veazie*, 40 Me. 96; *Currier v. Lowell*, 16 Pick. (Mass.) 170.

and that the plaintiff by the exercise of reasonable care might have passed the object, therefore judgment was given for the defendant.

SEC. 328. As a traveler may under certain circumstances go upon the margins of a highway, it is the duty of the town to erect barriers to prevent the traveler from danger against steep declivities, miry places, or any exposure to injury which might be avoided if such railings or barriers were erected.¹ In *Alger v. Lowell*, 3 Allen (Mass.), 398, it was held that where a person passing along the street was pushed down a steep declivity by a crowd, which declivity was not protected or guarded by a railing, in the absence of any malice or willful negligence of the crowd or any person in it, the plaintiff might recover of the city for the injury sustained therefrom.

SEC. 329. So, too, it is the duty of towns where there are no visible objects to indicate the limits of a highway, and nothing that would put a traveler upon his guard or prevent him while traveling over the highway in the night from straying off from the same, to erect guards around dangerous places so near to the

¹ In *Hayden v. Attleborough*, 7 Gray (Mass.), 338, it was held that the absence of a railing at the side of a highway when necessary for the security of travelers, is a "deficiency" within the provisions of the statute. *Norris v. Litchfield*, 35 N. H. 271; *Hunt v. Pownal*, 9 Vt. 411; *Collins v. Dorchester*, 6 Cush. (Mass.) 396; *Kimball v. Bath*, 38 Me. 219; *Palmer v. Andover*, 2 Cush. (Mass.) 600; *Ireland v. Oswego Turnpike Co.*, 13 N. Y. 526; *Cobb v. Standish*, 14 Me. 198; *Joliet v. Virley*, 35 Ill. 28; *Hyatt v. Rondout*, 44 Barb. (N. Y. S. C.) 385; *Chicago v. Gallagher*, 44 Ill. 295; *Davis v. Hill*, 41 N. H. 329; *Portsmouth v. Wiley*, 35 id. 303; *State v. Bangor*, 30 Me. 341. In a recent case in Wisconsin, *Houfe v. Fulton*, 29 Wis. 296; 9 Am. Rep. 570, it was held that where a person in crossing a bridge, on the sides of which there was no railing, with his horse, and the horse while on the bridge suddenly stopped, staggered and fell over the side of the bridge, precipitating the plaintiff upon the ice

below, the town was liable, although the proximate cause of the injury was the temporary loss of control over the horse while upon the bridge, but without the fault of the plaintiff. In *Munson v. The Town of Derby*, 37 Conn. 298; 9 Am. Rep. 332, the town had legally discontinued an old highway, and established a new highway in place of the old one, which was in every respect sufficient, but neglected to erect a fence or other barrier to prevent travelers from going upon the old road. The Housatonic Water Power Co. opened a ditch upon the old road and completely across it, about twenty feet deep. The plaintiff in passing over the highway in the evening passed upon the old highway and was precipitated into the ditch and severely injured. The court held that the town was liable for the injuries. That it was not only its duty to erect, but to maintain a suitable barrier to guard passengers against straying upon the old road.

highway as to render traveling there hazardous.¹ But where the limits of the highway are well defined the town is not bound to fence its road or otherwise guard against travelers going outside its limits.² In fact, it may be said, that a town is bound at all hazards to make its highway safe, and as to whether it is or not, as well as what is necessary to make it safe, is a question of fact to be determined in each case according to the circumstances.³

On extraordinary occasions, as where a railroad is being constructed across a highway, or while a portion of the highway is being repaired, or a new bridge is being erected, or an old one repaired, all that can be required of the town is, that it shall provide a suitable way for passage, as safe as the circumstances will allow.⁴

SEC. 330. A town cannot shift its liability to keep a highway in repair, either upon an individual or corporation. It may arrange with individuals to keep them in repair, or may be so situated, as in the case of a railroad using a portion of a highway, or crossing it with a bridge, as to have a remedy over for damages which it is compelled to pay for defects therein, but *it is pri-*

¹ *Munson v. Town of Derby*, 9 Am. Rep. 332; 37 Conn. 298; *Thorp v. Town of Brookfield*, 30 Conn. 320.

In *Ireland v. The Oswego, etc., Plank-road Co.*, 13 N. Y. 526, the defendants were authorized to use an existing highway for the construction of their road. In grading for the Plank-road the defendants, within the bounds of the former highway, excavated the earth so as to make a new path lower than the former traveled track. The new track diverged from the traveled pathway of the former highway. The two tracks were on a level at the point where they separated, and each was of sufficient width at that point to admit of traveling with a carriage; but the old pathway gradually became higher than the new track, and grew narrower until it came to a point at a place where it was elevated from two to three feet above the new track. The evidence tended to show that the plaintiff, driving along in the evening, kept to the old path and was thrown from his wagon and seriously injured. DENIO, J., said: "Where a road is so

constructed or altered as to present at one point two paths, both of which exhibit the appearance of having been used by travelers, and one of them leads to a dangerous precipice, while the other is quite safe, it is the duty of those having charge of the road, to indicate, in a manner not to be mistaken, by day or by night, that the unsafe path is to be avoided; and if it cannot be otherwise done, to put up such an obstruction as will turn the traveler from the wrong track."

² *Hayden v. Attleboro*, 7 Gray (Mass.), 338; *Davis v. Hill*, 41 N. H. 329; *Tuttle v. Holyoke*, 6 Gray (Mass.), 447; *Innes v. Edinburgh*, Hay. 1; *Cogswell v. Lexington*, 4 Cush. (Mass.) 307; *Bartlett v. Vaughn*, 6 Vt. 243.

³ *Bartlett v. Vaughn*, 6 Vt. 243; *Collins v. Dorchester*, 6 Cush. (Mass.), 394; *Norwich v. Breed*, 30 Conn. 535; *Thorp v. Brookfield*, 36 id. 320; *Munson v. Derby*, 37 id. 398.

⁴ *Willard v. Newbury*, 22 Vt. 458; *Beatty v. Duxbury*, 24 id. 155; *Barber v. Essex*, 27 id. 62; *Kimball v. Bath*, 38 Me. 219.

marily liable, and cannot interpose as a defense that some person or corporation is bound to keep the road in repair,¹ and in Maine it has been held that this is so, even where there is a statute requiring the person or corporation to keep the road or bridge in repair. But in Massachusetts a different doctrine is held, and in view of the fact that the liability of the town is purely statutory, it would seem that where the statute casts a portion of the duty and liability upon a person or corporation by reason of a peculiar use that they are permitted to make of the highway, that to that extent, the town ought to be relieved from liability.²

SEC. 331. Where a highway or bridge is suddenly swept away or destroyed by a flood or other natural causes or act of God, there is no common-law liability to rebuild.³ But if the bridge only is swept away, and the highway is left unimpaired, the bridge must be rebuilt as speedily as possible. So, too, towns are bound to rebuild their roads and bridges with reasonable dispatch, however they may have been destroyed.⁴ So, too, turnpike companies are bound by the common law to keep their road passable, and when swept away by flood, are bound to repair them without unreasonable delay,⁵ and neither towns or turnpike companies can excuse themselves from this liability.⁶

SEC. 332. It has been held that the duty of towns to erect railings along their highways at dangerous points, and upon their bridges, does not require them to erect railings that are safe for travelers to lean against, and that towns are not liable for damages

¹ State v. Gorham, 37 Me. 451.

² Sawyer v. Northfield, 7 Cush. (Mass.) 490.

³ Rex v. Landulph, 1 M. & R. 393; Regina v. Bamber, 5 Q. B. 279; Regina v. Hornsea, 25 Eng. Law & Eq. 532.

⁴ Clark v. Corinth, 41 Vt. 449; Boxford v. Essex, 7 Pick. (Mass.) 337; Briggs v. Guilford, 8 Vt. 264; Frost v. Portland, 11 Me. 271.

⁵ People v. The President, Directors and Company of the Hillsdale and Chatham Turnpike Co. 23 Wendell (N. Y.) 254. In this case the bridges upon the turnpike were swept away, and after more than a year, not having

been repaired, the people, through the Attorney-General brought an information in the nature of a *quo warranto*. COWEN, J., said: "The better opinion is, that a destruction of bridges which by not being restored leaves the road impassable for any considerable length of time, presents such a state of non-repair as would work a forfeiture at common law. The road thus becomes and continues to be a *common nuisance*."

⁶ Chamberlain v. Enfield, 43 N. H. 356; Palmer v. Portsmouth, 43 id. 265; Kimball v. Bath, 38 Me. 219; Blaisdell v. Portland, 39 id. 113.

sustained by persons from the "giving way" of railings under such circumstances.¹ The reason for this rule is, that the liability of the town only extends to the maintenance of its roads and bridges in a safe condition for *travel*. It is not bound to furnish immunity against those who use the highway for any other purpose.

SEC. 333. The duty of a town to the traveling public does not extend to the length of keeping its highways in such condition that no injury can possibly happen to a person. While a proper degree of care is required from the town, so on the other hand at least ordinary care is required from the traveler. He cannot shut his eyes and drive along the highway in a reckless manner. He must keep his eyes open, and keep up a proper degree of watchfulness against danger.² He cannot drive into a dangerous place in the road simply because he cannot pass without doing so; neither can he drive against an obstruction because it happens to be in the highway.³ It is only against accidents that result upon a highway to a traveler exercising reasonable care, that the town is bound to furnish indemnity.⁴ It is not called upon or required to insure one against the consequences of his folly.⁵ It must keep its roads safe for ordinary public travel, but if a dangerous pit or obstruction exists in the highway, which the traveler sees and can avoid, he is bound to do so at his peril.⁶ And if his vision is defective, if he would use the highway, he

¹ Orcutt v. Kittery Point Bridge Co., 53 Me. 500; Stickney v. Salem, 3 Allen (Mass.), 374; Stinson v. Gardner, 42 Me. 248.

² Hubbard v. Concord, 35 N. H. 52; Wilson v. Charlestown, 8 Allen (Mass.), 137; Horton v. Ipswich, 12 Cush. (Mass.) 488; Raymond v. Lowell, 6 id. 524; Cotter v. Wood, 98 Eng. Com. Law, 568; Rathbun v. Payne, 19 Wend. (N. Y.) 399.

³ In Raymond v. Lowell, 6 Cush. (Mass.) 524, a person who attempted to cross a street in the day time at a point which had been necessarily and properly appropriated for a drain, and which was covered by an iron grating, and in doing so slipped and fell and was thereby injured. There being no

necessity for his attempting to pass at that point it was held that he could not recover for his injuries, he not being in the exercise of a proper degree of care.

⁴ Hanlon v. Keokuk, 7 Iowa, 488; Brown v. Jefferson, 16 id. 339; Smith v. Lowell, 6 Allen (Mass.), 39; Barker v. Savage, 45 N. Y. 191; Hartfield v. Roper, 21 Wend. (N. Y.) 399; Nicholson v. R. R. Co., 41 N. Y. 542; Baxter v. R. R. Co., id. 502; Hartz v. Central Co. of N. J., 42 id. 472.

⁵ Hubbard v. Concord, 35 N. H. 52.

⁶ Carolus v. Mayor, etc., 6 Bosw. (N. Y. Sup. Ct.) 15; James v. San Francisco, 6 Cal. 528; Packard v. New Bedford, 9 Allen (Mass.) 90.

must do it with an added degree of caution.¹ But he is not precluded from passing over the street. He has a right to rely upon the streets, as being safe, and if, in the exercise of proper care, he is injured, by reason of any defect which the town is bound to repair, the town is liable to respond in damages.

The question as to what is a defect in a highway, or as to whether the defect caused the injury complained of, is always a question of fact for a jury,² and in determining the question, the nature of the accident, the circumstances under which it occurred, the character of the road, the extent of its use, the season of the year, the nature of the soil, the climate, the acquaintance of the party with the highway, are all to be considered in determining the question of liability.³ The fact that the highway was built, or repaired, with the greatest degree of care, when the duty of keeping in repair is imposed by express statute, will not relieve from liability, if the road was in point of fact defective, liability attaches for all the injurious results.⁴ But, in all other instances, as in the case of turnpike roads, towns or municipal corporations, where only a common-law liability exists, ordinary care in the construction and maintenance of roads is all that is required.⁵ It would be impossible to refer to all the instances in which certain conditions of a highway have been held defective. The subject thoroughly treated would require more than a volume of itself. It will be understood, from what has already been said, that any thing *omitted* to be done, as well as any thing done or existing in a highway that endangers the safety of public travel over it, is a defect, and that, if actual injury results therefrom, liability attaches for the consequences upon that person or body upon whom the law imposes the duty of repairing or maintaining the highway.

¹ *Renwick v. N. Y. C. B. R. Co.*, 36 N. Y. 133; *Davenport v. Ruckman*, 37 id. 568.

² *Johnson v. Haverhill*, 35 N. H. 74; *Providence v. Clapp*, 17 How. (U. S.) 161; *Green v. Danby*, 12 Vt. 338; *Merrill v. Hampden*, 26 Me. 234; *Fitz v. Boston*, 4 Cush. (Mass.) 365; *People v. Carpenter*, 1 Mich. 273.

³ *Hutchinson v. Concord*, 41 Vt. 271.

⁴ *Howe v. Castleton*, 25 Vt. 162; *Merrill v. Hampden*, 26 Me. 234; *Horton v. Ipswich*, 12 Cush. (Mass.) 488.

⁵ *Bridge Co. v. William*, 9 Dana (Ky.), 403; *Goshen Turnpike Co. v. Sears*, 7 Conn. 86; *Davis v. Lamoille County Turnpike Co.*, 27 Vt. 602; *Townsend v. Turnpike Co.*, 6 Johns. (N. Y.) 90.

CHAPTER EIGHTH.

NUISANCES RELATING TO WATER.

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365. Flooding lower lands by fitful and unnatural discharges of water.

SEC. 334. There is no special property or ownership in *running* water. While it remains in the earth intermingled with the soil itself, or while it lies there, or even when upon the surface in a state of inertia, it is the property of him who owns the land,¹ but

¹ *Haldeman v. Bruckhart*, 45 Penn. 724; *Chasemore v. Richards*, 7 H. L. St. 514; *Harwood v. Benton*, 32 Vt. Cas. 349; *Acton v. Blundell*, 12 Mees. &

when it has liberated itself and assumes a distinctive form apart from the soil, and forces itself from the boundaries in which it has been confined and assumes the attributes of a running stream, however small in proportions or insignificant in the purposes to which it can be applied, it at the same time loses its character as property, and, like light and air, becomes subject to the reasonable use of every person through whose land it flows, but still is the actual property of no one.

There are rights incident thereto in the owner of the soil which cannot be violated with impunity; rights that are distinct from those enjoyed by the public generally, and which exist not because of any special property in the water, but because of the ownership of the land over and through which it flows, and the rights that are necessarily created thereby. Every person has a right to have the air that diffuses itself over his land come there in its natural purity and in its usual volume, subject to such reasonable interference therewith, as arises from a reasonable use of it by others. So with water. When it takes a course and settles itself into a natural channel it becomes the right of every person to have it flow over his land in that natural channel, undiminished in quantity and unimpaired in quality, except to the extent that grows out of a reasonable use for the usual and ordinary purposes of life by those above him on the stream.¹

W. 336; *Bassett v. Company*, 43 N. H. 579; *New River Co. v. Johnson*, 2 E. & E. 415; *Trustees v. Youmans*, 45 N. Y. 362; *Chatfield v. Wilson*, 28 Vt. 49; *Frasier v. Brown*, 12 Ohio St. 304; *Bliss v. Greely*, 45 N. Y. 671; *Wheatley v. Baugh*, 25 Penn. St. 528; *Roath v. Driscoll*, 20 Conn. 533; *Ellis v. Duncan*, 21 Barb. (N. Y. S. C.) 230; *Hanson v. McCue*, 42 Cal. 303.

¹ *Mason v. Hill*, 5 B. & Ad. 1. In *Tyler v. Wilkinson*, 4 Mason (U. S.), 397, STORY, J., says: "Every proprietor upon each bank of a stream is entitled to the land covered with water in front of his bank to the middle thread of the stream. * * * In virtue of this ownership he has a right to the use of the water flowing over it in its natural current, without diminution or obstruction. But, strictly speaking, he has no property in the water itself, but a simple use of it while it passes along."

In a case recently decided in the court of appeals in New York, *Clinton v. Myers*, 46 N. Y. 511; 7 Am. Rep. 373, GROVER, J., says: "No proprietor has the right to use the water to the prejudice of other proprietors above or below him on the stream. He has no property in the water itself, but a simple usufruct of it as it passes along."

Chasemore v. Richards, 7 H. L. 349; *Wood v. Waud*, 3 Exchq. 748; *Lord v. Commissioners of Sidney*, 12 Mos. P. C. 473; *Davis v. Getchell*, 50 Mo. 604; *Gould v. Boston Dock Co.*, 13 Gray (Mass.), 443; *Campbell v. Smith*, 3 Halstead (N. J.), 140; *Hendricks v. Cook*, 4 Ga. 241; *Gardner v. Newburgh*, 2 Johns. Ch. (N. Y.) 162; *Johnson v. Jordan*, 2 Metc. (Mass.) 234; *Merrifield v. Lombard*, 13 Allen (Mass.), 16; *Holsman v. Boiling Spring Co.*, 1 McCarter (N. J.), 335; *Bardwell v. Ames*, 23 Pick. (Mass.) 354; *Twiss v. Baldwin*, 9 Conn.

SEC. 335. But while the water itself is not the subject of property, yet, all those over whose land it flows have a usufructuary interest therein, which passes by a grant of the soil, and which to that extent becomes the subject of property, and may be the subject of sale or lease like the land itself.¹ To illustrate the idea more forcibly, a deed of the land over and along which water runs, conveys also all the usufructuary interest or property in the water,² but a deed of the water or the usufructuary interest therein does not pass the title to the soil over which the water flows.³ Thus one person may be the owner of the soil over which a stream flows, and yet have no interest in the water that flows there; or he may have a partial interest therein according to the terms or conditions of the grant by which he holds the soil. It is not water itself which thus becomes the subject of bargain and sale, for no man owns that, and consequently cannot sell it, but it is the beneficial uses to which it may be applied by the owner of the land while passing over the soil, that becomes the subject of traffic.⁴

291; *Platt v. Johnson*, 15 Johns. (N. Y.) 213; *Embrey v. Owen*, 6 Exchq. 333; *Haas v. Choussard*, 17 Texas, 538; *Evans v. Merriweather*, 3 Scam. (Ill.) 492; *Shrieve v. Voorhees*, 2 Green's Ch. (N. J.) 25; *Dilling v. Murray*, 6 Ind. 324; *Hayes v. Waldron*, 44 N. H. 584; *Bliss v. Kennedy*, 43 Ill. 71.

In *Willis v. Thomas*, Argus Reports, 4th Sept., 1860 (Melbourne, Victoria), the court say that the question of lawful or unlawful use of water is one of degree; that the right of the owner of land adjoining a river to the use of the water is incident to his property in the land; that he has as such owner a right to the reasonable use of the water, having reference to the rights of others, but has no property in the water itself.

¹ *Luttrell's Case*, 4 Coke, 86; *Saunders v. Newman*, 1 B. & Ald. 258; *Mason v. Hill*, 5 B. & Ad. 1; *Tyler v. Wilkinson*, 4 Mason (U. S.), 397; *Chasemore v. Richards*, 7 H. L. 349. The right to have water flow in its natural channel by a riparian owner only extends to the channel in his own land. An owner above or below him on the stream may divert the water into a new channel provided he does not thereby affect the flow of the water in

its natural channel upon the lands of others. In *Norton v. Valentine*, 14 Vt. 239, it was held that the proprietor of lands through which a stream of water runs may obstruct the natural channel and divert it into any portion of his land if the water is returned into its original channel before it passes upon the land of another.

There can be no complaint on the part of another unless the diversion is injurious to him to the extent of producing actual damage. He is entitled to the natural flow of the water over his land in its natural channel, and so long as he thus receives the water undiminished in quantity and unimpaired in quality, he has no ground for complaint or cause of action, whatever may be done by others with the water.

² *Bullen v. Reynolds*, 2 N. H. 255; *Canal Commissioners v. The People*, 5 Wend. (N. Y.) 423; *Van Gordon v. Jackson*, 5 Johns. (N. Y.) 440.

³ *Browne v. Kennedy*, 5 H. & J. (Md.) 195.

⁴ *Wood v. Wand*, 3 Exchq. 746; *Mason v. Hill*, 5 B. & Ad. 306; *Clinton v. Myers*, 46 N. Y. 511; *Surry v. Pigott*, Paph. 169; *Brown v. Best*, 1 Wils. 174; *Tyler v. Wilkinson*, 4 Mason (U. S.), 397.

SEC. 336. It should be understood in the outset, that every riparian owner upon either side of a running stream, in the absence of limitation in his grant, owns the bed of the stream to the center thereof.¹ And this is true whether the stream is narrow or of extraordinary width.² In *Dwyer v. Rich*, 4 Irish Rep. (C. L.) 424, the question was whether, when a stream is of an *extraordinary* width, a conveyance bounded thereon could by implication be extended to the center of the stream. The court held that the size or width of a fresh water stream made no difference in the application of the rule. That the title of the bed of the stream, whether large or small, narrow or wide, rested in the riparian owners, and that they each owned the bed of the stream to the middle thereof. The ownership of the river bed gives no superior right to the use of the water, but the owner of either bank whose title does not cover any portion of the river bed, could not erect a dam, and thus could not apply the water to manufacturing purposes, unless the natural fall of the water would enable him to do so without a dam.³

SEC. 337. The right of a riparian owner to the use of the water that flows by his land is a right to its use in its natural condition, both as to quality and quantity, and also to its natural momentum of fall and power, and while an upper riparian owner may erect a dam and apply the water to a beneficial use, and may use all the water, if he still permits it to flow in its accustomed channel to the land of the lower proprietors, yet the property in the water is not divisible, and one proprietor may not take what he regards as, and what in reference to the right to use the water as to other proprietors on the same dam, his specific share thereof would be, and divert it from another's land. Such a use of the water would create an actionable nuisance.⁴

¹ *People v. Canal Appraisers*, 13 Wend. (N. Y.) 355; *Brown v. Kennedy*, 5 H. & Johns. (Md.) 195; *Middleton v. Pritchard*, 3 Scam. (Ill.) 510; *Morgan v. Reading*, 3 S. & M. (Miss.) 366; *Canal Trustees v. Havens*, 11 Ill. 554; *Rockwell v. Baldwin*, 53 id. 19; *Hubbard v. Bell*, 54 id. 510.

² *Dwyer v. Rich*, 4 Irish Rep. (C. L.) 424 Exchq.; *Baily v. R. R. Co.*, 4 Har-

rington (Del.), 389; *Berry v. Snyder*, 3 Bush. (Ky.) 266.

³ *Vanderburgh v. Vanderbergen*, 13 Johns. (N. Y.) 212; *Blanchard v. Baker*, 8 Greenl. (Me.) 253.

⁴ *Plumleigh v. Dawson*, 1 Gilman (Ill.), 544; *Evans v. Merriweather*, 3 Scammon (Ill.), 592; *Miller v. Marshall*, 5 Mur. (Scotch) 28.

The uses of water may properly be divided into two classes, primary and secondary. The *primary* right is to its use for domestic purposes, for the support of life in man and beast, and the *secondary* right is its use for manufacturing and other beneficial purposes.¹ Therefore, if there is not more than sufficient water in a stream to supply the *primary* wants, no one can use the water for any of the *secondary* purposes.²

The owner of the banks being the owner of the bed of the stream may maintain an action for any encroachment upon the *alveus* without showing any special damage, and if, from any cause, the stream becomes dry, or its course is changed, he is entitled to the land forming the old bed. But while the water remains in the old bed and flows over it, the owner of the banks cannot interfere with the *alveus* in such a manner as to interfere with the rights of others.³

SEC. 338. Water-courses are streams of water flowing in a defined channel between banks, and are either natural or artificial, and embrace all running streams, from the little rivulet that dances noiselessly along its tiny pathway, to the swift running and noisy river that rushes with unresistless fury over and through a vast expanse of territory, bearing on its bosom the products of the country through which it traverses, to the markets of the world. It is not necessary that the water flow continuously. If there be a defined channel, and water flows in that channel at certain seasons of the year, while at others it is dry, this is a water-course within the legal import of the term. If it has the three requisites of a water-course, shore, banks and channel, and has a definite source, though it is sometimes dry, it is nevertheless a water-course. But in order to entitle a stream to that character it must have a source independent of that fitful and occasional character that results from the falling of rain or the melting of snow. In *Shields v. Arndt*, 3 Green's Ch. (N. J.) 234, Chancellor PENNINGTON thus defines a water-course: "There must be *water* as well as land, and it must be a *stream usually flowing*

¹ *Dunn v. Hamilton*, 2 S. & McL. (Scotch) 356.

² *Evans v. Merriweather*, 3 Scammon (Ill.), 492.

³ *Lord Norbury v. Kitchen*, 15 L. T. (N. S.) 511; *Bickett v. Morris*, 1 L. R. (Sc.) 47.

in a particular direction. It need not flow continually, as many streams in this country are at times dry. There is a wide distinction, however, between a regular flowing stream of water, which at certain seasons is dried up, and one which in times of a freshet, or the melting of snow, descends from the mountain and inundates the country.”

In *Dickinson v. Worcester*, 7 Allen (Mass.), 19, it was held that an action would not lie for obstructing the flow of water through an artificial ditch, when the water has been accumulated from rains, or the melting of snow, or the under draining of the land.

SEC. 339. And this would be the case so far as water arising from the melting of snow and the falling of rain is concerned, even though at such seasons it took a definite channel. But where there is a definite source, as water accumulated in wet swampy ground, and running off upon the surface in a definite channel, and not dependent upon spasmodic causes, such as the falling of rain or the melting of snow, or the ever varying fluctuations of the season, even though at times it be dry, it is nevertheless a water-course. So too where water rises to the surface of the earth from a spring, and flows in a defined natural channel from the lands upon which it arises to the lands of another, even though the stream be small, and not of sufficient volume or force to break the soil over which it flows, yet having a definite source and a channel, it is such a water-course as prevents the owner of the land upon which it originates from interfering with it to the injury of those over whose land it flows.¹

SEC. 340. Thus in *Duddon v. The Guardians of Clutton Union*, 38 Eng. Law & Eq. 526, which was a case where the waters from a spring flowed in a gully or natural channel to a stream on which a mill was located, the defendant cut off the stream at its source, and detained the water in a tank, under a license from the owner of the soil upon which the spring existed. The owner of the mill brought an action for an injury to his

¹ *Dickinson v. Canal Co.*, 7 Exchq. *Ganed v. Martyn*, 19 C. B. (N. S.) 732; 282; *Bangor v. Lansil*, 51 Me. 525; *Eunor v. Barwell*, 4 L. T. (N. S.) 597. *Ashley v. Walcott*, 11 Cush. (Mass.) 192;

water-course, and the court held that this obstruction of the water of the spring constituted an actionable nuisance.

MARTIN, B., said: "The owners of land from its source to the sea have a natural right to the use of the water of it. A river begins at its source when it comes to the surface, and the owner of the land on which it rises cannot monopolize all the water at its source, so as to prevent its reaching the lands of proprietors below."

POLLOCK, C. B., said: "This was a natural spring, the waters from which had acquired a natural channel, from its source to the river. It is *absurd* to say that a man may take the water of such a stream four feet from its surface."

In the case of *Gillett v. Johnson*, 30 Conn. 180, there was a spring on the lands of the defendant, some sixteen rods from the plaintiff's land, which supplied a small stream of water that ran to the plaintiff's land. The water as it came from the spring was sufficient to fill a half-inch pipe, and the flow was constant and uniform. For seven rods the stream descended rapidly in a well-defined course to a piece of marshy ground, where it spread, so that its flow was sluggish and not swift enough to break the turf over which it flowed, but sufficient to form a slow sluggish current along the surface of the ground, in a natural depression to a watering place within the plaintiff's land. The court held that this was a water-course, and that while the defendant was entitled to a reasonable use of the water for the purposes of irrigation, etc., yet he was bound not to deprive the plaintiff of a sufficient supply of water for his watering place below.

SEC. 341. When water takes a definite channel, and has a definite source as a spring, it assumes the attributes of a water-course at its source, and entitles every person through whose land it flows to all the rights of riparian owners, and the owner of the soil upon which it originates has no more right to divert it at its source, so as to interfere with its natural flow in its usual channel to the owners of the land below, than he would have to divert the flow of a river from its natural and usual course.¹

¹ *Duddon v. Guardians, etc.*, 1 H. & N. 630.

SEC. 342. Thus it will be seen that it is not the quantity of water that makes a water-course, but the definite source, the channel, the banks, and the water. With these attributes, however small the supply of water, or however insignificant the uses to which it may be applied, it is a water-course within the purview of the law, and gives to every person through whose land it flows the right of riparian owners, and any interference therewith in violation of the rights of others, either at its source or elsewhere in the stream, is an actionable nuisance.¹

SEC. 343. In *Luther v. Winnisimet Co.*, 9 Cush. (Mass.) 171, BIGELOW, J., thus defines a water-course: "A stream of water usually flowing in a definite channel having a bed, sides or banks, and usually discharging itself into some other stream or bed of water. To constitute a water-course the size of the stream is not important; it might be very small, and the flow of the water need not be constant. But it must be something more than a mere surface drainage over the entire face of a tract of land, occasioned by unusual freshets, or other extraordinary causes."

SEC. 344. In a recent case in Massachusetts² it appeared that from time immemorial a natural stream of water had flowed across the road and upon the defendant's lands and across the same. That for a part of the way it ran in a regularly defined channel, but when within about five rods of the plaintiff's land the water spread out over the surface of the ground covering a space a few rods in width, and so ran upon and across the plaintiff's land, in which was a level meadow, and irrigating it in a valuable manner, through its whole length — about seven rods — and thence on to land of other owners beyond. That from the point where it spread out upon the surface of the defendant's land it flowed in no defined channel either on the plaintiff's or defendant's land, but at a point a short distance after it left the plaintiff's land it assumed a definite channel again and formed a small brook, and thus ran to the river.

¹ *Gillett v. Johnson*, 30 Conn. 180; *Luther v. Winnisimet*, 9 Cush. (Mass.) 171; 11 Am. Rep. 349.
² *Macomber v. Godfrey*, 108 Mass. 192; *Kauffman v. Griesmier*, 26 Penn. St. 407.

The defendant diverted the water and turned it so that no part of it reached the plaintiff's land, thus injuring his crops. CHAPMAN, C. J., in delivering the opinion of the court, says: "If the whole of the stream had sunk into the defendant's soil, and no water had remained to pass to the plaintiff's land except under the surface, it would have ceased to be a water-course, and the plaintiff would have had no right to it.¹ Or if the water had only flowed in temporary outbursts, caused by melting snow or by rain, it would have been surface water merely,² and the defendant might have diverted it, and the plaintiff might have raised barriers on his land to prevent its flowing upon his land.³ But when, owing to the level character of the land, it spreads out over a wide space without any apparent banks, yet usually flows in a continuous current, and passes over the surface of the land below, it continues to be a water-course.⁴ If the plaintiff had erected a barrier to keep it from his land, it would evidently have accumulated by its natural and regular flow upon the defendant's land, not merely when there are melting snows and rains, but at all seasons. We cannot doubt that not only the defendant, but all the lower proprietors, could have maintained an action against the plaintiff for any damage caused by such obstruction, for it has a regular and permanent flow from a definite source, and its usual course is in a channel, with a well-defined bed and banks, and neither upon the land of the plaintiff or of the defendant does it lose this character."

A stream flowing underground, the existence of which is known, as well as the source of supply, and having an open outlet, is a water-course, and cannot be interfered with any more than a stream upon the surface. But if nothing is known as to its source, the owner of the land may deal with it as he pleases, and if in the uses to which he puts his land, or in draining it, he taps the spring from which it originates, no action lies. The spring is cut off before it reaches the surface,⁵ but, if it has reached the

¹ Broadbent v. Ramsbotham, 11 (Mass.), 106; Franklin v. Fisk, 13 id. Exchq. 602; Buffum v. Harris, 5 R. I. 211.

² Ashley v. Wolcott, 11 Cush. (Mass.) 192.

³ Gannon v. Hargdon, 10 Allen

⁴ Gillett v. Johnson, 30 Conn. 180.

⁵ POLLOCK, C. B., in Duddon v. Guardians, etc., 7 H. & N. 630; Haldman v. Bruckhart, 45 Penn. St. 514.

surface and discharges itself in a definite channel over it, the owner of the land has no right to interfere therewith.¹

SEC. 345. It may be understood in the outset that the mere ownership of the soil over which water flows gives no special or beneficial interest in the water. It is rather the ownership of the banks on either side of the stream that creates and upholds the right, and the owner of the bed of the stream can do no act that will in any measure interfere with the beneficial uses to which the owner of the banks of the stream and the lands adjacent may reasonably apply it.² Thus it will be seen that while one owner upon the banks of a stream may own the whole land covered by the water, yet he thereby acquires no additional rights to the water itself, as against the owner of the opposite bank, nor can he for that reason interfere with the beneficial uses to which the owner of the opposite banks may reasonably apply the water, any more than he could if each owned the bed of the stream to the middle channel thereof.³

The right of the owners of land along which water flows is not in any measure dependent upon prescription or presumed grant. It is a purely natural right incident to the land and growing out of the ownership and possession thereof. As such owner of the land he becomes vested with all the rights of a riparian owner, and, although he may, by virtue of such ownership, grant to others the right to use the water as he might use it, yet he cannot confer upon another the rights of a riparian owner, without a conveyance of the soil upon the margin of the stream. The distinction between the rights of the owner of the soil and one who holds a simple water right by grant from the land owner, is broad and important, and cannot be ignored. Thus while one riparian owner may maintain an action against another owner above or below him on the stream for an interference therewith that is prejudicial to him, and in violation of his rights, yet one who derives from one riparian owner a right to take water from the stream, but has no right or title to the banks thereof, cannot maintain an action against another riparian owner

¹ Dickinson v. Canal Co., 7 Ex. 282.

² Phear on Rights of Water, p. 13.

³ Wood v. Waud, 3 Exchq. 748;

Stockport Water-works Co. v. Potter, 3 H. & C. 300; Hartshorn v. Wright,

Peters (C. C. U. S.), 64.

for any interference therewith. He may maintain an action against his grantor for any interference by him with the rights that were given by the grant, but the right of action grows out of the contract between them, and extends no farther, and the reason is, that the rights of a riparian owner cannot be detached from the soil out of which they arise, and to which they are incident, and therefore cannot be transferred without an actual conveyance of the soil itself.¹

SEC. 346. In all cases where no other title exists, priority of appropriation gives the better right, and all those who are subsequent in point of appropriation take the water subject to the rights of the prior occupant.² But as between riparian owners

¹ Stockport Water-works Co. v. Potter, 3 H. & C. 300; Nutall v. Bracewell, 2 L. R. Exchq. 1; Laing v. Whaley, 3 H. & N. 675; Hill v. Tupper, 2 H. & C. 121. In Laing v. Whaley, *supra*, the plaintiffs were the owners of a mine which they worked by means of a steam engine, the water to feed which was taken from a canal by the consent of one of the owners.

The defendants were the proprietors of certain chemical works upon the canal in question into which they discharged the refuse from their works by the same right that the plaintiffs used the water for their engine. The result was that the waters of the canal were corrupted to such an extent as to seriously impair their use by the plaintiffs. In the court of exchequer upon a motion in arrest (judgment having been given for the plaintiff in the court below), WIGHTMAN, J., said: "I can find nothing in the declaration to show that the defendant, by fouling the water, injured any right of the plaintiffs, nor that as against them he can be regarded as a wrong-doer. I am, therefore, of the opinion, that the declaration does not show any right of action against the defendant. * * * Neither the plaintiff or defendant are riparian proprietors, and each appears to have done what they did by the permission or sufferance of the owners of the canal, and I am of the opinion that the defendant is entitled to our judgment," but a majority of the court were in favor of sustaining the verdict and the judgment for the plaintiff was

affirmed; but the case is clearly in conflict with Hill v. Tupper, *supra*, which is a later case, and Stockport Water-works Co. v. Potter, in which it was held that the rights which a riparian owner has in respect to the water of a stream are derived entirely from his possession of land abutting on the river. If he grants away any portion of his estate so abutting the grantee becomes a riparian owner, and has similar rights. But that if he grants away a portion of his estate not so abutting on the river, the grantee has no water rights by virtue of his possession, and can only take by grant as against the grantor.

² Pool v. Lewis, 44 Ga. 162. In Tyler v. Wilkinson, 4 Mason (C. C. U. S.), 397, STORY, J., says: "Mere priority of occupation of running water, without consent or grant, confers no exclusive right. It is not like the case of mere occupancy where the first occupant takes by force of his priority of occupation. That supposes no ownership already existing and no right to the one already acquired. But our law awards to the riparian owners the right to the use in common, as one incident to the land, and whoever seeks to found an exclusive use must establish a rightful appropriation by some means known and admitted by the law."

This seems to be the generally accepted doctrine in this country.

Davis v. Fuller, 12 Vt. 178; Wadsworth v. Tillotson, 15 Conn. 213; Heath v. Williams, 25 Me. 209; Plumley v.

priority of appropriation gives no superior right except to the extent that no owner above him who has appropriated the water can pen it back so as to detain it unreasonably, nor can one below throw the water back upon him. In the former instance others coming upon the stream may acquire the right to the residuum of the water, but their use is subordinate to prior appropriations in the order of appropriation, and is subject to such a condition of things as exist at the time of the appropriation. Not only is this so, but the rule is carried still farther, and he is estopped from doing any thing which, in the ordinary and natural course of things, will operate to abridge those prior uses.¹

Dawson, 1 Gil. (Ill.) 544; Bullen v. Runnels, 2 N. H. 257; McAlmont v. Whitaker, 3 Rawle (Penn.), 84; Baldwin v. Calkins, 10 Wend. (N. Y.) 167. There are authorities to the contrary in which it is held that prior occupancy merely gives a superior right. That a diversion of a water-course, without injury to those lower down the stream, is the violation of a right for which the law implies damages, and an action may be sustained. But it may be now considered the settled doctrine both in this country and England, that no superior rights can be acquired to the use of the water of a stream, unless by the user of the same adversely for the statutory period in such a way that at any time within that period other owners were so far injured by a violation of their legal rights that they might have maintained an action for such injury. Norton v. Valentine, 14 Vt. 239; Pugh v. Wheeler, 2 Dev. & Bat. (N. C.) 50; Mason v. Hill, 5 B. & Ad. 1; also, 1 B. & Ad. 1; Platt v. Johnson, 15 Johns. (N. Y.) 213; Palmer v. Mulligan, 3 Caines (N. Y.) 397; Merritt v. Brinkerhoff, 17 Johns. (N. Y.) 306; Pool v. Lewis, 4 Ga. 162.

¹ Mason v. Hill, 1 B. & Ad. 1. In Proctor v. Jennings, 6 Nevada, 83, it was held that a person appropriating a water right on a stream already partly appropriated acquires a right to the surplus or residuum he appropriates; and those who acquired prior rights, whether above or below him on the stream, cannot change or extend their use of water to his prejudice, but are limited to the rights enjoyed by them when he secured his. At common law riparian proprietors were entitled to

have the water naturally flowing over or past their land continue so to flow without interruption or diminution.

But in California, owing to the peculiar situation of the lands therein (belonging to the United States government, but thrown open to the common use of miners and others), a different rule has properly been adopted. There the first appropriator of the water is held entitled without regard to the occupancy of the lands over which the water naturally flowed. Ortman v. Dixon, 13 Cal. 33; McDonald v. Asken, 29 id. 207; Kelly v. Natoma Water Co., 6 id. 105; McKinny v. Smith, 21 id. 374. As to rights acquired by appropriation see the following cases:

In *Maine*, Lincoln v. Chadborn, 56 Me. 197; Davis v. Winslow, 51 id. 290; Davis v. Getchell, 50 id. 604; Butman v. Hussey, 12 id. 407; Heath v. Williams, 25 id. 209; Blanchard v. Baker, 8 id. 253.

In *Nevada*, Lobdell v. Simpson, 2 Nev. 274; Robinson v. Imp'l Co., 5 id. 44.

In *Massachusetts*, Cary v. Daniels, 8 Metc. 466; Thurber v. Martin, 2 Gray, 394; Brace v. Yale, 10 Allen, 441; Springfield v. Harris, 4 id. 494; Gould v. Boston Duck Co., 13 Gray, 442; Hatch v. Dwight, 17 Mass. 289; Sumner v. Tileston, 7 Pick. 198; Smith v. Agawam Canal Co., 2 Allen, 355; Chandler v. Howland, 7 Gray, 384.

In *Vermont*, Martin v. Bigelow, 2 Aiken, 184; Davis v. Fuller, 12 Vt. 178.

In *Connecticut*, Tucker v. Jewett, 11 Conn. 311; King v. Tiffany, 9 id. 162; Buddington v. Bradley, 10 id. 213; Twiss v. Baldwin, 9 id. 271; Ingraham v. Hutchinson, 2 id. 584; Sherwood v. Burr, 4 Day, 244.

SEC. 347. Each riparian owner upon a stream has a right to use the water in a reasonable way, for domestic purposes, for the irrigation of his land, or for the propulsion of machinery, if the quantity of water in the stream will warrant such use above domestic uses. Indeed, he may use it for any of the ordinary purposes of life, but his use must be such as not to interfere measurably with the rights of those above or below him on the stream. But the right to use water for domestic purposes does not justify the use of an equal quantity thereof for other purposes, even though none is used or required for domestic purposes by the riparian owner. This was held where a railroad company was the owner of the banks of a stream. The company appropriated a portion of the water of the stream for the purposes of the road, insisting upon their right to do so so long as they did not appropriate more than would be required for ordinary domestic purposes. But the court held that, while a riparian owner had a right to use the water of a stream for special purposes, this did not authorize him to use an equal quantity for any other purpose, and that it made no difference that from the very nature of things the water would never be required by them for such special purposes.¹ He may confine the water by a dam erected across the stream, or by other artificial means, but he is bound at his peril to provide against injury to those above or below him on the stream from any usual or ordinary cause, such as prudence would suggest from the condition of the country, and the lessons of its experience. He is bound to observe the effects of the dam at the time when it is built, as well as at all seasons of the year, and to adapt it in strength, height, and in all respects to the ordinary and usual state of things upon the stream.² If it is located where freshets and floods come at regular or periodical intervals, and with extraordinary severity, he must adopt all the precautions that reasonable prudence would suggest, to avoid injury to others above or

In Georgia, Pool v. Lewis, 41 Ga. 168.
In Pennsylvania, Hartzall v. Sill, 12 Penn. St. 248; Hay v. Sterritt, 2 Watts, 327.

In New Jersey, Shreve v. Voorhees, 2 Green's Ch. 25.

In New York, Merritt v. Brinkerhoff, 17 Johns. 306; Amelvany v. Jagers, 2 Hill, 634; Corning v. Iron Co., 8

Barb. (S. C.) 311. Also the following English cases: Mason v. Hill, B. & Ad. 1; Franklin v. Falmouth, 6 C. & P. 529; Cox v. Matthews, 1 Ventris, 237.

¹ Attorney-General v. Great Eastern R. R. Co., 18 W. R. 1187; L. T. (N. S.) 284.

² Inhabitants of China v. Southwick, 3 Fairfax (Me.), 238.

below him on the stream, and failing in that, he is liable for all the injuries that his dam inflicts.¹

But from injuries that result from unusual, extraordinary or unforeseen causes, such as extraordinary floods, or storms, no liability exists, provided he has used reasonable care to guard against such conditions as are ordinarily incident to the stream.²

SEC. 348. The rule is that each proprietor upon a stream who appropriates the water by artificial means for the propulsion of machinery or otherwise, must do so in a reasonable manner, both as respects the structure by which the water is confined and in its use, and in such a manner as to interfere as little as possible with its natural flow. He must not detain it too long, so as to set it back upon those above him on the stream, or so as to keep it from going to those below in its ordinary and usual flow. Neither

¹ Bell *v.* McClintock, 9 Watts (Penn.) 119. In Bailey *v.* The Mayor of New York, 2 Denio (N. Y.), 433, it appeared that the city of New York, through its proper officers, erected a dam across the Croton river so as to divert the water thereof for the use of the city. The dam was erected of sufficient strength and capacity to resist the usual and ordinary floods incident to the section, but was not of sufficient strength to resist the extraordinary floods that it was shown upon the trial occasionally arose upon the river, and upon the happening of one of those the dam was swept away, and the plaintiff's buildings were destroyed. It was held that the city was liable for the damage that ensued. That the lessons of experience having demonstrated the occasional occurrence of these heavy freshets, made it the duty of the city to provide against them, by the erection of such a dam as would be dictated by that degree of prudence which a prudent man would exercise if the whole loss and damage was his own. In the case of Lapham *v.* Curtis, 5 Vt. 371, it was held that every person who erects a dam is bound to use ordinary care in its construction and maintenance, and in drawing off the water so as to prevent injury to those below him on the stream, and failing in that is liable for all the damages that ensue.

In Proctor *v.* Jennings, 8 Nev. 83, it

was held that when a dam was erected on a stream below another's mill, and so as to not at the time to interfere with it, but subsequently, on account of a new process of mining going into operation on the stream above, extraordinary quantities of sediment were deposited so as with the dam to interfere with the mill above. *Held*, that as the injuries resulting to the mill were not occasioned immediately by the dam, but by unforeseen and fortuitous circumstances happening afterward, though acting in connection with it the owner of the dam was not responsible.

In that case it was held that a dam erected on a stream in nowise injurious or prejudicial at the time of its erection to a mill above, but which, by reason of circumstances that could not have been anticipated, happening subsequently and operating in connection with it, causes the water to flow back upon the mill, is not such an obstruction as to authorize its abatement or justify a recovery of damages against the person building it.

² Lapham *v.* Curtis, 5 Vt. 371. It is not enough that the dam is sufficient for ordinary floods, if the stream is occasionally subject to great floods, those must also be provided against, and the dam must be built with a view to resisting them. Mayor of New York *v.* Bailey, 2 Denio (N. Y.), 433.

must be discharge it fitfully and in excessive quantities, but must regulate his use as a reasonably prudent man would do, in view of the usual and natural flow of the stream, and consistently with the unavoidable and necessary disturbance which a proper and lawful use of it for the operation of his power requires, keeping within the limits of his right and adapting his use of the water to the capacity of the stream and the quantity of water flowing there.¹ The question of reasonableness is one that must necessarily depend upon the varying circumstances of each case, upon the size of the stream, the uses to which it is applied, and the manner in which it is used, and is necessarily a question for the jury.²

SEC. 349. The water may be raised by a dam so as to keep it up to his neighbor's line, but he is bound at his peril not to raise it above the line so as to flow his land, and he will be answerable for all injuries that result from such causes as are usual and ordinarily incident to the locality, by rises in the stream which might be reasonably anticipated during any season of the year. If the stream is in a section of country where at certain seasons of the year at regular intervals large bodies of rain fall, so as to swell the stream to unusual proportions, or where large bodies of snow fall, which in melting finds its way into the stream and creates a freshet or flood, a much higher degree of care is required than in a section where these occurrences are the exception rather than the rule. In the one case he who pens up the stream by a

¹ *Mabie v. Mattison*, 17 Wis. 1. In *Shaw v. Cumiskey*, 7 Pick. (Mass.) 76, the defendant dug a ditch so as to convey the washings from his brewery into a clay pit in the plaintiff's back yard. This was held an actionable nuisance.

In *Merritt v. Parker, Coxe* (N. J.), 460, it was held that an upper owner on a stream could not increase the quantity of water that flows in a stream without the consent of a lower owner.

In *Merritt v. Brinkerhoff*, 17 Johns. (N. Y.), it was held that an upper owner could not legally detain the water in his pond and then discharge it fitfully and in unusual quantities upon lower owners.

The principle upon which these cases are predicated is, that any act of a person that changes the natural flow of running water to the damage of another, is an interference with his rights, and an actionable nuisance.

In *Hetrick v. Deuchler*, 6 Penn. 32, the court held that where water was detained and then let off in such a manner as to flood the plaintiff's mill, the question as to the reasonableness of the detention was for the jury.

² *Springfield v. Harris*, 4 Allen (Mass.), 496; *Davis v. Getchell*, 50 Me. 604; *Ferreira v. Knipe*, 28 Cal. 348; *Casebeer v. Mowrey*, 55 Fenn. St. 423.

dam, is bound at his peril to guard against damage to others therefrom, either from storm or flood, while in the other, only reasonable care is required, and no liability attaches because the damage is the result of unusual, extraordinary and unforeseen causes.¹

SEC. 350. Every owner of a dam upon a stream is bound to keep it in proper repair, and in this respect must exercise such care as is dictated by reasonable prudence, and for any failure in this duty he is answerable to those below as well as above him on the stream, for all damages which arise to them therefrom. He must, in the size, height, and strength of his dam, as has previously been stated, have reference to the condition of the stream in its natural condition at all seasons of the year, and must not interfere with its natural flow so as to injure the rights of those above or below him on the stream. If he raises his dam to an unreasonable height so as to throw the water back upon those above him on the stream to their injury, or if he discharges it in an unusual or unreasonable manner so that it would naturally flow over the lands of those below him to their injury, he has created a nuisance, and is liable for all the consequences.² It is the right of every riparian owner to have the water come to his land in its natural channel, and by its natural flow, undiminished in quantity, and unimpaired in quality, except to that extent that results from a reasonable use of the water by other owners upon the stream; and it may fairly be said that any use of the water by one owner which essentially interferes with its natural flow to the injury of any owner upon the stream, whether above or below him, is an actionable nuisance.³

¹ *Dorman v. Ames*, Minn. 451.

In *Cooper v. Barber*, 3 Taunt. 99, the defendant had for many years penned back the water of a stream for the purpose of irrigation, so that the water percolated through the neighboring soil. The plaintiff erected a house upon the land, and, receiving injury from the percolation of the water, the court held that a recovery could be had, even though the injury occurred only in times of high water.

Williams v. Gale, 3 H. & Johns. (Md.) 231; *Wright v. Howard*, 1 Sim. & Sta.

(Ch.) 203; *China v. Southwick*, 3 Fairfax (Me.), 238.

² *Richardson v. Kier*, 34 Cal. 69; *Hill v. Ward*, 2 Gil. (Ill.) 285; *Lapham v. Curtis*, 5 Vt. 371; *Mayor v. Bailey*, 3 Denio (N. Y.), 433; *Rex v. Trafford*, 1 B. & Ad. 874; *Farquharson v. Farquharson*, 3 Bligh, 421; *Johns v. Stevens*, 3 Vt. 308; *Hodges v. Hodges*, 5 Metc. (Mass.) 205.

³ *Tyler v. Wilkinson*, 4 Mason (U. S. C. C.), 400; *Webb v. Portland Manufacturing Co.*, 3 Sumner (U. S. C. C.), 189; *Bowman v. Latham*, 2 McLean (U. S. C. C.), 376.

The rights of riparian owners upon a water-course were well defined by the court in *Miner v. Gilmour*, 13 Moore's P. C. 131, as follows: "Every riparian owner has a right to the reasonable use of the water flowing past his land for domestic purposes, and for his cattle, and this, without regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream. He has also the right to the use of the water for any other purpose, provided he does not thereby interfere with the rights of other proprietors above or below him.

Subject to this condition a riparian proprietor may dam up the stream for the purpose of a mill, or divert the water for the purpose of irrigation.

But he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury."

SEC. 351. So strictly is the right to have water flow in its usual and natural channel adhered to by the courts, that it has been held that where the waters of a stream had been diverted for a period of time sufficient to create an easement and a right in the party diverting it, to have it flow in its artificial channel, that the party diverting it might nevertheless abandon his easement and return the water to its original natural channel, even though by such return of the water to its natural bed, those below him on the stream sustained great damage by reason of the old bed of the stream having become filled up and incapable of properly discharging the water.

In *Mason v. Shrewsbury*, 6 L. R. (Q. B.) 577, it was held that where the waters of a stream had been diverted by a canal company under an act of parliament, and had for a period of fifty-three years been turned away from their natural course and bed, and at the expiration of that period the canal was abandoned, and the waters returned to their original channel, that no action could be maintained against the owners of the canal by those on the stream for the damages which they thereby sustained. COCKBURN, C. J., in delivering the opinion of the court, said: "The right of diverting water which, in its natural course, would flow over or along the land of a riparian owner, and of conveying it to the land

of the party diverting it, the '*servitus aquæ decendæ*' of the civilians is an easement well known to the law of this as of every other country. Ordinarily such an easement can be created according to the law of England by grant, or by long continued enjoyment, from which the existence of a former grant may reasonably be presumed. But such a right may, like any other right, be created in derogation of a prior right by the action of the legislature. But, however the right is created, it is essentially the same. The legal incidents connected with it are the same, whether the easement is created by grant or by statutory enactment. It is of the essence of such an easement that it exists for the benefit of the dominant tenement alone, being in its very nature a right created for the dominant owner, its exercise by him cannot operate to create a new right for the benefit of the servient owner. Like any other right its exercise may be discontinued if it becomes onerous, or ceases to be beneficial to the party entitled.

An easement like the present, while it subjects the owner of the servient tenement to disadvantage by taking from him the use of the water, for the watering of his cattle, the irrigation of his land, the turning of his mill, or other beneficial use to which the water may be applied, may, on the other hand, no doubt be attended incidentally with other or greater advantage to him, as, for instance, rendering him safe against inundation. But this will give him no right to insist on the exercise of the easement on the part of the dominant owner if the latter finds it expedient to abandon his right. In like manner, where the easement consists in the right to discharge water over the land of another, though the water may be advantageous to the servient tenement, the owner of the latter cannot acquire the right to have it discharged on to his land, if the dominant owner chooses to send the water elsewhere, or to apply it to another purpose. It appears to me a fundamental principle, that an easement exists for the benefit of the dominant owner alone, and that the servient owner acquires no right to insist on its continuance, or to ask for damages on its abandonment." If, however, the diversion of the water in the first instance is unlawful, and has not ripened into an easement, its return to its original channel, like its diversion in the first instance, would be a nuisance which would impose upon the wrong-doer

liability for all the consequences, not only arising from the diversion, but also from the return of the water to its original channel.¹ And if the diversion had existed for a sufficient length of time to ripen into an easement, and others in view of the diversion had established mills upon the new stream so created, the person making the diversion and his grantors would, as against the owners of the mills below, be estopped from returning the water to its original channel to their injury.² But if there have no such rights grown up upon the new stream it would seem, from the tenor of the cases cited above, that, as against the owners of the original bed of the stream, the waters might be restored to the old channel.

In the case of *Pierce v. Kinney*, 59 Barb. (N. Y. S. C.) 56, the plaintiff and defendant were the owners of adjoining farms through which was a stream of water running easterly on the defendant's farm, nearly parallel to, and only a short distance from, the plaintiff's land, where it emptied into the river. In 1863 a flood visited that section, and this stream breaking through its south bank, made a new channel for itself in which it would have continued to run over the defendant's land, except that some time afterward, but during the same year, the defendant erected a barrier to force the water back into its original channel. The water continued to run in its old channel from 1863 to 1865, when another flood came, and bringing dirt and gravel down from the plaintiff's land and depositing it in the bed of the stream some few rods below where this barrier was erected, crowded the water out of the old channel to the north, where it leached over the lands of the plaintiff, and seriously injured their value. The injury resulted as a consequence of the erection of the barrier by the defendant to force the waters back into their old channel after the flood of 1863, and the plaintiff's counsel requested the court to charge the jury that after the flood of 1863, if the defendant would restore the south bank of the stream to its original height as a protection to his own land, he was under obligation at the same time to restore the channel to its original condition, i. e., to remove any sand or gravel bar that may have

¹ Woodbury v. Short, 17 Vt. 387.

² Belknap v. Trimble, 3 Paige's Ch. (N. Y.) 665.

been formed below there, upon the defendant's land, by which the water was thrown upon the plaintiff's land. The court refused so to charge, and upon a hearing of the exceptions at the general term in 1869, BOARDMAN, J., in a very able opinion, laid down the law of the case substantially thus: "The simple question is, whether the defendant is bound to keep the channel of the creek open, as a condition to his right to maintain the barrier which he has erected for his own protection. If he fails to do so, is he liable for the damages that ensue? It is conceded that the defendant had a right to erect the barrier across the new channel made by the flood, and thus protect his orchard and farm from serious injury.

The defendant claims such a right unconditionally. The plaintiff insists that such right cannot be exercised without at the same time opening, and at all times thereafter keeping open, the original bed of the creek so far as it runs on his own land, and delivering the water to the plaintiff at his boundary in its ordinary and accustomed channel. I find no sanction for any such claim. Angell on Water-courses, § 333, says: "A riparian proprietor may in fact legally erect any work in order to prevent his land being overflowed by any change of the natural state of the river, and to prevent the old course of the river from being altered, citing *Rex v. Trafford*, 1 B. & Ad. 874 (which does not sustain the author's position); *Farquhausen v. Farquhausen*, 3 Bligh. Parl. (N.S.) 421." "But," says Angell, "he has no right to build any thing which, in times of ordinary flood, will throw the waters on the ground of another proprietor so as to overflow and injure them." Erskine says: "When a river threatens an alteration of its channel to the damage of an adjacent proprietor it is lawful to build a bulwark, *ripæ muniendæ causa*, to prevent the loss of ground that is threatened; so that a proprietor whose grounds are threatened to be washed away may, for the purpose of protecting his own property, raise a bank for his own security; but this bank must be so erected as to prejudice neither the navigation nor the grounds on the opposite side of the river. The owner of a water-course may change its course on his own land if he does not thereby injure his neighbor. So he may change it back to its original channel, unless others, by an expen-

diture of money, have acquired new rights to its use in the new channel." Washburn on Easements, citing *Woodbury v. Short*, 17 Vt. 387.

It may fairly be inferred from these authorities that the defendant had the right to erect the barrier and thus confine the waters in their original channel. Nor is there any intimation that he is responsible for any damage to his neighbor unless it is the direct consequence of his building his barrier too high, or projecting it into the stream so as to prevent the water from running in its accustomed channel and with its usual force. He has the right to repair or rebuild the broken bank, not to make a *different* one. If he does this, no direct injury is done to his neighbor. The injury that may arise from a gravel bed lower down the stream is not due to the interposed barrier. It arises from an obstacle created by the natural flow of the stream. Had no crevasse been made, the gravel bank might, and undoubtedly would, have been deposited by the natural action of the stream. The crevasse having been opened and the barrier immediately interposed, it stands as though the defendant had done nothing, and yet the gravel bank is there doing the plaintiff damage.

Where the bank was broken so as to form a new channel for the water, it was optional with the defendant to close the opening and restore the water to its original channel, or let it pursue its new course. So if there were several openings, he might close all or any of them, or he might leave them all open. If he had closed one which injured himself and not closed one which injured the plaintiff, would an action lie for the damage? Such an action would seem to lie on what the defendant had not done, rather than on what he had lawfully done. Again, if a party's mill-dam is carried off by a flood which makes a gravel bed at a point below, changing the channel of the stream, may he not rebuild his dam unless he cuts away such bar and restores the water to its channel? Is he liable for the existence of the bar? Was it his act of omission or commission that put it there? * * * In my judgment both the complaint and the law must be amended, before it will be adjudged that there could be a recovery in this case."

In *Wallace v. Drew*, 59 Barb. (N. Y. S. C.) 413, the question

came up as to the right of a riparian owner to construct embankments upon his own land to prevent the water of *ordinary* floods washing the bank and overflowing his lands. The court held in that case that an embankment might thus be raised, due care being taken not to throw the water on to another's land where it would not go except for the embankment, in ordinary floods. But the court held that this rule would not apply to floods altogether extraordinary and unusual. In that case it appeared that although certain banks and erections made by the defendants on their own premises to guard the banks, and prevent the waters of the stream from injuring such premises, had caused the water of the creek to flow in a new direction upon the plaintiff's lands, where they did not belong and were not accustomed to flow, and where they would not have gone but for those guards and erections. But it also appeared that *all* the water which flowed upon the plaintiff's premises upon the occasion of the injury complained of, did not come from the branch of the creek which flowed through the defendant's lands, or by means of the guards or erections thereon, but that the waters of another branch of the creek, by reason of an obstruction placed therein by another party, had been added thereto, and thus produced the injury. The court held that the defendant could not be made liable for the injury resulting from the turning the waters of this branch of the creek into it, and would only be held for such injuries as resulted from the ordinary floods incident to the creek in its natural condition.

SEC. 352. While it is true that a riparian owner may erect bulwarks to protect his property from injury by the stream, yet, they can only do this when it can be done without injury to others. Either to an owner upon the opposite side of, or to those above or below him on the stream.¹

Thus in *Gerrish v. Clough*, 48 N. H. 8; 2 Am. Rep. 165, the defendant erected a breakwater upon his bank of the river to protect his bank from injury by the water, but the effect of this was

¹ *Bickett v. Morris*, 1 Law Rep. Ap. (Scotch) 47; *Robinson v. Lord Byron*, 1 Bfo. C. C. 588; *Rex v. Trafford*, 8 Bing. 204; *Wicks v. Hunt*, John. (Eng.) 372; *Scrutton v. Brown*, 4 B. & C. 485; *Rex v. Lord Yarborough*, 3 id. 91; *Adams v. Frothingham*, 3 Mass. 352; *Jones v. Soulard*, 24 How. (U. S.) 41; *Rex v. Johnson*, 5 N. H. 520.

to throw the water against the plaintiff's land upon the opposite bank, and in high water his land was washed away. This was held an actionable nuisance. So indeed is any interference with the natural current, level or flow of a stream. The right is to the water of the stream in its *natural* state, and interferences therewith operate a violation of this right, and are actionable even though no actual damage ensues.

SEC. 353. As has previously been stated the right of a riparian owner to use the water of a stream is limited to such a use as produces no injury to those above or below him on the stream, but he may acquire a right by long user to use the water to an extent beyond the natural right and so as to operate prejudicially to others. He may begin the exercise of such a use at any time, but he acquires no right beyond his natural right by such usage against a proprietor above or below him, unless his use affects the power of such proprietors to use the stream, or some right therein, so as to raise the presumption of a grant, and thus render them servient tenements.¹ He may divert the water, or discharge it in a manner that is prejudicial to others, or he may set it back upon the land of those above him upon the stream, but he is liable for all damages, or to an action for an injury to the right, even if there is no special damage, at any time before the statutory period for acquiring rights by adverse enjoyment has elapsed; but if such use is permitted without objection or such resistance as interrupts the use, the originally unlawful act ripens into a legal right, and he acquires the right to such use of the water in addition to his natural right, and forever thereafter all proprietors upon the stream are not only estopped from setting up any claims for damages resulting from such use, but are also estopped from any interference therewith. By such user he has created a servitude upon their estates to the extent of such use, which the law upholds and protects as rigidly as it protects and upholds his natural right.² But in order to acquire such rights the use must be adverse to the rights of others, and must also be continuous and uninter-

¹ Haight v. Price, 21 N. Y. 241; Mor-
ton v. Valentine, 14 Vt. 243; Belknap

² Gale & Whately on Easements, p.
93.

v Trimble, 3 Paige's Ch. (N. Y.) 605.

rupted. It is not essential that the use should be such as to inflict actual damage upon others, but it must be such an infringement of the rights of others that an action could have been maintained therefor at any time within the statutory period.¹ The use must also be open,² and as of right,³ and also peaceable,⁴ for if there is any act done by other owners that operates as an interruption, however slight, it prevents the acquisition of the right by such use.⁴

SEC. 354. Thus where an owner upon one side of a stream erects a dam across the stream, this is an invasion of the right of the owner of the opposite bank, and an action will lie at any time for such invasion of his right; but if the opposite owner stands by and allows the dam to remain without action or other direct interference therewith for the whole statutory period, the act which, in its inception, was unlawful, ripens into a right, and a servitude is to that extent imposed upon the estate of the opposite owner in favor of the person who erected the dam, or his grantees.⁵ By this long adverse user an easement is acquired to the extent of such user, which cannot be impaired by the owner of the servient tenement any more than the natural right could be.⁶ The extent of the easement as well as its character is commensurate with the use during the time necessary to acquire the right, and it is incumbent upon him who claims the easement, to establish it by clear and definite proof. When the easement is once acquired, it

¹ *Butman v. Hussey*, 3 Fairfax (Me.), 407; *Hatch v. Dwight*, 17 Mass. 296; *Patrick v. Greenway*, note, 1 Wm. Saunders, 346; *Norton v. Valentine*, 14 Vt. 239; *Webb v. Portland Manufacturing Co.*, 3 Sumn. (U. S. C. C.) 189.

² *Partridge v. Scott*, 3 Mott. 229; *Dodd v. Holmes*, 1 Ad. & El. 493.

³ *Canal Co. v. Hartford*, 1 C. & M. & R. 614; *Auley v. Gardner*, 4 M. & W. 496; *Fickle v. Brown*, 4 Ad. & El. 369; *Bolival Manufacturing Co. v. Neponset Co.*, 16 Pick. (Mass.) 241; *Gairty v. Bethune*, 14 Mass. 49; *Bealey v. Shaw*, 6 East. 208.

⁴ *King v. Tiffany*, 9 Conn. 162; *Co. Litt.* 113 b.; *Wright v. Williams*, 1 M. & W. 100. Thus in *Bailey v. Appleyard*, 3 Nev. & Peake, 257, it was held that where the owner of premises

erected a rail across a path used by the plaintiff within the statutory period, this was such an interruption as prevented the user from ripening into a right, even though the interruption is only for a brief period. Every interruption is presumed to be hostile, and the burden is upon him who claims the right by long user to show that interruptions were not hostile and in opposition to the right.

⁵ By the civil law any opposition, whether by word or deed, was regarded as an interruption, but at common law the interruption must be by some of the owners of the servient tenement that may fairly be said to be hostile to the right. *Gale & Whatley on Easements*, p. 82, 83.

⁶ *Bliss v. Rice*, 17 Pick. (Mass.) 23.

is added to the natural right, and an infringement of the one is as much a nuisance as the infringement of the other.¹

SEC. 355. In *Tyler v. Wilkinson*, 4 Mason (U. S. C. C.), 397, STORY, J., thus defines the rights of riparian owners: "*Prima facie*, every proprietor upon each bank of a river is entitled to the land covered with water in front of his bank, to the middle thread of the stream; or, as it is commonly expressed, *ad medium filum aquæ*."

In virtue of this ownership he has a right to the use of the water flowing over it in its natural channel, without diminution or obstruction. But, strictly speaking, he has no property in the water itself, but a simple use of it while it passes along. The consequence of this principle is, that no proprietor has the right to use the water to the prejudice of another. It is wholly immaterial whether the party be a proprietor above or below in the course of the river, the right being common to all the proprietors on the river; no one has a right to diminish the quantity which will, according to the natural current, flow to a proprietor below, or to throw it back upon a proprietor above. This is the necessary result of the perfect equality of right among all the proprietors of that which is common to all. The natural stream, existing by the bounty of Providence for the benefit of land through which it flows, is an incident annexed, by operation of law, to the land itself. When I speak of this common right, I do not mean to be understood as holding the doctrine that there can be no diminution whatsoever, and no obstruction or impediment whatsoever, by a riparian proprietor, in the use of the water as it flows; for that would be to deny any valuable use of it. There may be, and there must be allowed to all, of that which is common, a reasonable use. The true test of the principle and extent of the use is, whether it is to the injury of the other pro-

¹ *Bealy v. Shaw*, 6 East, 208; *Smith v. Adams*, 6 Paige's Ch. (N. Y.) 435; *Cook v. Hull*, 3 Pick. (Mass.) 269.

In *Haight v. Price*, 21 N. Y. 245, DENIO, J., says: "It is urged that a presumption should attach in the absence of any proof to the contrary, because every thing must be presumed

to have been rightfully done unless the contrary be shown.

"The diversion was *prima facie* a wrong, and though in its nature it was capable of excuse and justification, yet the burden was on the defendant of showing the existence of such facts. It is for the defendant to establish his right by proof."

prietors or not. There may be a diminution in quantity, or a retardation or acceleration of the natural current, indispensable for the general and valuable use of the water, perfectly consistent with the common right. The diminution, retardation or acceleration, not positively and sensibly injurious, by diminishing the value of the common right, is an implied element in the right of using the stream at all. The law here, as in many other cases, acts with a reasonable reference to public convenience and general good, and is not betrayed into a narrow strictness subversive of common sense, nor into an extravagant looseness, which would destroy private rights. The maxim is applied, *sic utere tuo ut alienum non lædas*.

“But of a thing common by nature, there may be an appropriation by general consent, or grant. Mere priority of occupation of running water, without such consent or grant, confers no exclusive right. It is not like the case of mere occupancy, where the first occupant takes by force of his priority of occupancy. That supposes no ownership already existing, and no right to the one already acquired. But our law awards to the riparian proprietors the right to the use in common, as one incident to the land; and whoever seeks to found an exclusive use, must establish a rightful appropriation in some manner known and admitted by the law. Now this may be either by a grant from all the proprietors, whose interest is affected by the particular appropriation, or by a long exclusive enjoyment without interruption, which affords a just presumption of right. By our law, upon principles of public convenience, the term of twenty years of exclusive uninterrupted enjoyment has been held a conclusive presumption of a grant or right. I say, of a grant or right—for I very much doubt whether the principle now acted upon, however in its origin it may have been confined to presumptions of a grant—is now necessarily limited to considerations of this nature. The presumption is applied as a presumption *juris et de jure*, wherever, by possibility, a right may be acquired in any manner known to be law.

“With these two principles in view, the general rights of the plaintiffs cannot admit of much controversy. They are riparian

proprietors, and, as such, are entitled to the natural flow of the river without diminution to their injury.

“As owners of the lower dam, and the mills connected therewith, they had no rights beyond those of any other persons who might have appropriated that portion of the stream to the use of their mills; that is, their rights are to be measured by the extent of their natural appropriation, and use of the water for a period, which the law deems a conclusive presumption in favor of rights of this nature. In their character as mill owners they have no title to the flow of the stream beyond the water actually and legally appropriated by the mills; but in their character as riparian proprietors, they have annexed to their lands the general flow of the river, as far as it has not been already acquired by some prior and legally operative appropriation.

“No doubt, then, can exist as to the right of the plaintiffs to the surplus of the natural flow of the stream not yet appropriated. Their rights as riparian proprietors are general; and it is incumbent on the parties who seek to narrow those rights, to establish, by competent proofs, their own title to divert and use the stream.”

SEC. 356. As to the right of a person to bring an action for the recovery of damages for a mere injury to a right, where no actual damage is sustained, the rule is, that in order to entitle the party to an action his rights to the water must be violated in such a way that if the violation thereof was continued it would ripen into an easement, and impose a servitude upon the estate affected thereby. In *Webb v. Portland*¹ this doctrine is discussed by STORX, J., in a very clear and concise manner, and the various authorities bearing thereon collected and reviewed. He says: “The question, which has been argued upon the suggestion of the court, is of vital importance in the cause; and if decided in favor of the plaintiff it supersedes many of the inquiries to which our attention must otherwise be directed. It is on this account that we thought it proper to be argued separately from the general merits of the cause.

“The argument for the defendants then presents two distinct

¹ *Webb v. Portland Manufacturing Co.*, 3 Sumn. (U. S. G. C.) 189.

questions. The first is, whether, to maintain the present suit, it is essential for the plaintiff to establish any actual damage. The second is, whether, in point of law, a mill owner, having a right to a certain portion of the water of a stream for the use of his mill at a particular dam, has a right to draw off the same portion, or any less quantity of the water, at a considerable distance above the dam, without the consent of the owners of other mills on the same dam. In connection with these questions the point will also incidentally arise, whether it makes any difference, that such drawing off of the water above can be shown to be no sensible injury to the other mill owners on the lower dam. As to the first question, I can very well understand, that no action lies in a case where there is *damnum absque injuria*, that is, where there is a damage done without any wrong or violation of any right of the plaintiff. But I am not able to understand how it can correctly be said, in a legal sense, that an action will not lie, even in case of a wrong or violation of a right, unless it is followed by some perceptible damage which can be established as a matter of fact; in other words, that *injuria sine damno* is not actionable.¹ On the contrary, from my earliest reading I have considered it laid up among the very elements of the common law, that, wherever there is a wrong, there is a remedy to redress it; and that every injury imports damage in the nature of it; and if no other damage is established the party injured is entitled to a verdict for nominal damages; *a fortiori* this doctrine applies where there is not only a violation of the right of the plaintiff; but the act of the defendant, if continued, may become the foundation by lapse of time of an adverse right in the defendant; for then it assumes the character, not merely of a violation of a right, tending to diminish its value, but it goes to the absolute destruction and extinguishment of it. Under such circumstances, unless the party injured can protect his right from such a violation by an action, it is plain that it may be lost or destroyed without any possible remedial redress. In my judgment the common law countenances no such inconsistency, not to call it by a stronger name. Actual, perceptible damage is not indispensable as the

¹ See *The Mayor of Lynn, etc., v. 143, 144*; *Comyn's Dig* Action on the Mayor of London, 4 T. R. 130, 141, Case, B. 1 and 2.

foundation of an action. The law tolerates no farther inquiry than whether there has been the violation of a right. If so, the party injured is entitled to maintain his action for nominal damages, in vindication of his right, if no other damages are fit and proper to remunerate him.

"So long ago as the great case of *Ashby v. White*¹ the objection was put forth by some of the judges, and was answered by Lord Holt with his usual ability and clear learning; and his judgment was supported by the house of lords, and that of his brethren overturned. By the favor of an eminent judge Lord Holt's opinion, apparently copied from his own manuscript, has been recently printed.²

"In this last printed opinion (p. 14) Lord Holt says: 'It is impossible to imagine any such thing as *injuria sine damno*. Every injury imports damage in the nature of it.' And he cites many cases in support of his position. Among these is *Turner v. Sterling*,³ where the plaintiff was a candidate for the office of bridge-master of London bridge, and the lord mayor refused his demand of a poll; and it was determined that the action was maintainable for the refusal of a poll. Although it might have been that plaintiff would not have been elected, the action was nevertheless maintainable; for the refusal was a violation of the plaintiff's right to be a candidate. So in the case cited,⁴ where the owner of a market, entitled to toll upon all cattle sold within the market, brought an action against the defendant for hindering a person from going to the market with the intent to sell a horse, it was, on the like ground, held maintainable; for though the horse might not have been sold, and no toll would have become due; yet the hindering the plaintiff from the possibility of having toll, was such an injury as did import such damage for which the plaintiff ought to recover. So in *Hunt v. Dowman*,⁵ where

¹ *Ashby v. White*, 2 Lord Raym. 938; S. C., 6 Mod. 45; Holts, 524.

² See "The judgments delivered by the Lord Chief Justice Holt in the case of *Ashby v. White et al.*, and in the case of *John Paty et al.*, printed from the original MS." London: Saunders & Benning, 1837. It is understood that the publication is under the direction of Lord Chief Justice DENMAN. See particularly p. 14, 15, 27, 30 of these opinions.

³ L. P., 2 Lord Raym. 955.

⁴ *Turner v. Sterling*, 2 Lev. 50; S. C., 2 Vent. 25.

⁵ Cited as from 23 Edward III, 18, tit. Defense. Mistake in the MS. and should be 29 Edward III, 18 b; Fitz. Abridg., tit. Defense, pl. 5 and 11 H. IV, 47.

⁶ *Hunt v. Dowman*, Cro. Jac. 478; S. C., 2 Roll. 21.

the lessor brought an action against the lessee for disturbing him from entering into the house leased, in order to view it and to see whether any waste was committed; and it was held that the action well lay, though no waste was committed and no actual damage done; for the lessor had a right so to enter, and the hindering of him was an injury to that right, for which he might maintain an action. So *Herring v. Finch*,¹ where it was held that a person entitled to vote, who was refused his vote at an election, might well maintain an action therefor, although the candidate for whom he might have voted might not have been chosen; and the voter could not sustain any perceptible or actual damage by such refusal of his vote. The law gives the remedy in such a case; for there is a clear violation of the right.

And this doctrine, as to a violation of the right to vote, is now incontrovertibly established; and yet it would be impracticable to show any temporal or actual damage thereby.²

In the same case of *Ashby v. White*, as reported by Lord RAYMOND,³ Lord HOLT said: "If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy, if he is injured in the exercise or enjoyment of it; and indeed, it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal."⁴

The principles laid down by Lord HOLT are so strongly commended, not only by authority, but by the common sense and common justice of mankind, that they seem absolutely, in a judicial view, incontrovertible. And they have been fully recognized in many other cases.⁵ I am aware that some of the old cases inculcate a different doctrine, and perhaps are reconcilable with that of Lord HOLT. There are also some modern cases, which at first view seem to the contrary. But they are distinguishable from that now in judgment; and if they were not *ego assentior scævolaë*. The case of *Williams v. Morland*⁶ seems to have proceeded upon the ground that there was neither any damage nor

¹ *Herring v. Finch*, 2 Lev. 250.

² See *Harmer v. Tappenden*, 1 East, 55; *Drew v. Carleton*, id. 563, note; *Kilham v. Ward*, 2 Mass. 236; *Lincoln v. Hapgood*, 11 id. 350; 2 *Viner's* Abridg., Action, Case, N. c. pl. 3.

³ *Ashby v. White*, 2 Lord Raym. 953.

⁴ S. P., 6 Mod. 53.

⁵ Note of Mr. Sergeant WILLIAMS to *Mellor v. Spateman*, 1 Sand. 346, a, note 2; *Wells v. Watling*, 2 W. Black, 1239; and the case of the *Tunbridge Dippers*, *Weller v. Baker*, 2 Wils. 414.

⁶ *Williams v. Morland*, 2 B. & Cres.

910.

any injury to the right of the plaintiff. Whether that case can be supported upon principle, it is not now necessary to say. Some of the dicta in it have been subsequently impugned; and the general reasoning of the judges seems to admit, that if any right of the plaintiff had been violated, the action would have lain. The case of *Jackson v. Pesked*, 1 M. & Sel. 235, turned upon the supposed defects of the declaration, as applicable to a mere reversionary interest, it not stating any act done to the prejudice of that reversionary interest.

I do not stop to inquire whether there was not an over-nicety in the application of the technical principles of pleading to that case; although, notwithstanding the elaborate opinion of Lord ELLENBOROUGH, one might be inclined to pause upon it.

The case of *Young v. Spencer*, 10 B. & Cres. 145, turned also upon the point whether any injury was done to a reversionary interest. I confess myself better pleased with the ruling of the learned judge (Mr. Justice BAYLEY) at the trial, than with the decision of the court in granting a new trial. But the court admitted that if there was any injury to the reversionary right, the action would lie; and although there might be no actual damage proved, yet if any thing done by the tenant would destroy the evidence of title, the action was maintainable. *A fortiori*, the action must have been held maintainable if the act done went to destroy the existing right, or to found an adverse right. On the other hand, *Margetti v. Williams*, 1 B. & Ad. 415, goes the whole length of Lord HOLT's doctrine, for there the plaintiff recovered, notwithstanding no actual damage was proved at the trial; and Mr. Justice TAUNTON on that occasion cited many authorities to show that where a wrong is done, by which the right of the party may be injured, it is a good cause of action, although no actual damage be sustained. In *Hodson v. Todd*, 4 T. R. 71, 73, the court decided the case upon the very distinction which is most material to the present case, that if a commoner might not maintain an action for an injury, however small, to his right, a mere wrong-doer might, by repeated torts, in the course of time establish evidence of a right of common.

The same principle was afterward recognized by Mr. Justice GROSE in *Pindar v. Wadsworth*, 2 East, 162. But the case of

Bower v. Hill, 1 Bing. New Cas. 549, fully sustains the doctrine for which I contend; and, indeed, a stronger case of its application cannot well be imagined. There the court held that a permanent obstruction to a navigable drain of the plaintiff's, though choked up with mud for sixteen years, was actionable, although the plaintiff received no immediate damage thereby; for if acquiesced in for twenty years it would become evidence of a renunciation and abandonment of the right of way.

The case of *Blanchard v. Baker*, 8 Greenl. 253, 268, recognizes the same doctrine in the most full and satisfactory manner, and is directly in point; for it was a case for diverting water from the plaintiff's mill. I should be sorry to have it supposed for a moment that *Tyler v. Wilkinson*, 4 Mason, 397, imported a different doctrine. On the contrary, I have always considered it as proceeding upon the same doctrine.

Upon the whole, without going farther into an examination of the authorities on this subject, my judgment is, that whenever there is a clear violation of a right, it is not necessary in an action of this sort to show actual damage; and if no other be proved, the plaintiff is entitled to a verdict for nominal damages. And, *a fortiori*, that this doctrine applies, whenever the act done is of such a nature, as that by its repetition or continuance it may become the foundation or evidence of an adverse right.¹ But if the doctrine were otherwise, and no action were maintainable at law, without proof of actual damage, that would furnish no ground why a court of equity should not interfere and protect such a right from violation and invasion; for in a great variety of cases, the very ground of the interposition of a court of equity is, that the injury done is irremediable at law, and that the right can only be permanently preserved or perpetuated by the powers of a court of equity.

And one of the most ordinary processes to accomplish this end is by a writ of injunction, the nature and efficacy of which for such purpose I need not state, as the elementary treatises fully expound them.² If, then, the diversion of water complained of in the present case is a violation of the right of the plaintiffs, and

¹ See, also, *Mason v. Hill*, 3 B. & Ad. 804; S. C., 5 id. R. L. on Eq. Jurisp., ch. 23 § 86 to § 959, *Bolivar Manuf. Co. v. Neponset Manuf. Co.*, 16 Pick. 212.

² See *Eden on Injunctions*; 2 Story

may permanently injure that right, and become by lapse of time the foundation of an adverse right in the defendant, I know of no more fit case for the interposition of a court of equity, by way of injunction, to restrain the defendants from such an injurious act. If there be a remedy for the plaintiffs at law for damages, still that remedy is inadequate to prevent and redress the mischief. If there be no such remedy at law, then, *a fortiori* a court of equity ought to give its aid to vindicate and perpetuate the rights of the plaintiffs. A court of equity will not, indeed, entertain a bill for an injunction in case of a mere trespass fully remediable at law. But if it might occasion irreparable mischief, or permanent injury, or destroy a right, that is the appropriate case for such a bill.¹

Let us come, then, to the only remaining question in the case; and that is, whether any right of the plaintiff as mill-owner on the lower dam is or will be violated by the diversion of the water by the canal of the defendants. And here it does not seem to me that, upon the present state of the law, there is any real ground for controversy, although there were formerly many vexed questions, and much contrariety of opinion." * * *

SEC. 357. A riparian owner may convey to others the whole or any part of his rights to the beneficial use of the water, as well those that are incident to the soil as those which have been acquired by long use. He may divide up those rights and convey them subject to such conditions as he pleases, and the parties who take by conveyance are restricted in their use of the water to the conditions of the grant. They may, however, acquire additional rights as against each other or others by adverse user, as well as the owner of the soil.²

Where rights upon a dam to the use of water have been

¹ See Story on Eq. Jurisp., §§ 926, 927, 928, and the cases there cited; *Jerome v. Ross*, 7 Johns. Ch. 315; *Van Bergen v. Van Bergen*, 3 id. 282; *Newburgh Turnpike Co. v. Miller*, 5 id. 101; *Gardner v. Village of Newburgh*, 2 id. 162.

² *Norway Plains Co. v. Bradley*, 52 N. H. 103; *Bullen v. Runnels*, 2 id. 257.

In *Winnepisogee Lake Co. v. Young*,

40 N. H. 420, the court say: "If a party claims and exercises for twenty years the right to raise water as high as his dam will raise it when there is sufficient water to fill it, he will, by such user, acquire a right to the extent of his claim.

Watkins v. Peck, 13 N. H. 360; *Burnham v. Kempton*, 44 id. 78; *Kilgour v. Ashcom*, 2 H. & Johns. (Md.)

82.

divided up and parceled out by grant from the riparian owner, each must exercise his right within the limits of his grant, and any use of the water by him beyond the right conferred by the grant is a nuisance, for which any other owner upon the dam may maintain an action. He may be restricted by the grant to the use of the water for a particular purpose, and with certain kinds of wheels or machinery, but if no such restriction is imposed by the grant, he may use the quantity of water conveyed for any purpose, and with any kind of machinery, so long as he keeps within the scope of his rights as given by the grant.¹

Any riparian proprietor or mill-owner, who has acquired a right by prescription to use water beyond his natural right, or beyond that given by the grant, is not confined in his use of the water to a use of it in a particular manner, or to the same mill, but he may use it in any manner, or for the benefit or operation of any kind of machinery, so long as he does not prejudice the rights of others.² This right to substitute new uses and new machinery is rendered indispensable in order to encourage improvements in machinery and to enable manufacturers to avail themselves of profitable avenues of business.

SEC. 358. It has been illustrated by the brief statement of the rights of riparian owners that those rights consist in a reasonable use of the water of the stream, and it follows that every unreasonable use is a violation of the rights of others, and consequently is a nuisance. As to what constitutes a reasonable or unreasonable use of water is always a question of fact depending upon the circumstances of each case. But it may be said that the erection of a dam across a stream, to such a height as to flood the land above, is a violation of the rights of those owning lands there, and is a nuisance which renders the wrong-doer liable to all persons, whether riparian owners or not, whose lands are thereby flooded, for all the damages which they sustain.³

¹ *Elliott v. Shepherd*, 12 Shep. (Me.) 371; *Boston Water Power Co. v. Grey*, 6 Metc. (Mass.) 131; *Kennedy v. Scoville*, 12 Conn. 317; *Schuylkill Nav. Co. v. Moore*, 2 Whart. (Penn.) 477; *Dewey v. Bellows*, 9 N. H. 282; *Sumner v. Foster*, 7 Pick. (Mass.) 32; *Saunders v. Newman*, 1 B. & Ald. 257; *Budding-*

ton v. Bradley, 10 Conn. 213; *Miller v. Lapham*, 46 Vt. 525.

² *King v. Tiffany*, 9 Conn. 162; *Whit-
tier v. Cocheco Manuf. Co.*, 9 N. H. 454.

³ In *Stout v. McAdams*, 2 Scam. (Ill.) 67, the court held that no person had a right to place any obstruction in a stream so as to set the water back upon

Not only is this true of the actual flooding of lands by sending the waters of the stream over the banks upon the surface of the land, but also where a dam is constructed so as to throw back the water in unusual quantities, and by means thereof prevent its natural escape, whereby it is discharged upon land below in unusual quantities, or so that it percolates into the land of an owner above, so as to charge his soil with water in such quantities as to injure vegetation thereon, or so as to injure the water in wells, or to produce other injury by charging the land with water, these are also actionable nuisances.¹ So too where the water is thus set back upon a mill above so as to prevent the free and usual escape of water therefrom, whereby its wheel is flooded, or any injury produced to the operation of the mill or any right connected therewith.²

In *Butz v. Ihrie*, 1 Rawle (Penn.), 218, which was an action for setting the waters of a stream back upon the plaintiff's mill, the court say: "Any impediment in the stream caused by the defendant's dam by which the plaintiff's mill is stopped from grinding in any state of the water, or made to grind slower, or worse than it otherwise would, is an injury to the plaintiff's rights which will entitle him to damages."

In *Stout v. Millbridge Co.*, 45 Me. 76, it was held that the erection and maintenance of a dam without authority, whereby the lands of those above in the stream are flooded, as well as its continuance to their injury, is a nuisance, entitling every per-

another's land, even though the obstruction is a dam used for operating a mill. *Brown v. Bowen*, 30 N. Y. 537; *Davis v. Fuller*, 12 Vt. 178; *Garrish v. Clough*, 48 N. H. 9; 1 Am. Rep. 165; *Lee v. Pembroke*, 57 Me. 481; 2 Am. Rep. 59.

¹ *Bassett v. Company*, 43 N. H. 578; *Trustees v. Youmans*, 50 Barb. (N. Y. Sup. Ct.) 328; *Hendricks v. Cook*, 4 Ga. 241; *Ripka v. Sergeant*, 7 Watts (Penn.), 9; *Company v. Goodale*, 46 N. H. 56; *Tilotson v. Smith*, 32 id. 95; *Cooper v. Barber*, 3 Taunton, 99; *Odi-orne v. Lyford*, 9 N. H. 502; *Hutchinson v. Granger*, 13 Vt. 386; *Aldred's Case*, 9 Co. 59; *Bell v. McClintock*, 9 Watts (Penn.), 117; *Rex v. Trafford*, 1 B. & Ad. 874; *Merritt v. Parker, Coxe*

(N. J.), 460; *Johns v. Stevens*, 3 Vt. 308; *Sumney v. Mulford*, 5 Blackf. (Ind.) 202; *Bridgers v. Purcell*, 1 Ired. (N. C.) 232; *Yeargain v. Johnson*, 1 Taylor (N. C.), 80; *Hendricks v. Johnson*, 6 Porter (Ohio), 472; *Nichols v. Aylor*, 7 Leigh, 546; *Brown v. Bowen*, 30 N. Y. 513; *Griffen v. Foster*, 8 Jones' Law (N. C.), 337.

² *Brown v. Bowen*, 30 N. Y. 537; *Davis v. Fuller*, 12 Vt. 178. But this is restricted to the ordinary state of the water, and does not apply to an extraordinary and unusual condition of the stream. *Smith v. Agawam Canal Co.*, 2 Allen (Mass.), 355; *Hill v. Ward*, 2 Gil. 285; *Blanchard v. Baker*, 8 Me. 253; *Cowles v. Kidder*, 4 Foster (N. H.), 364.

son whose rights are thus injured to a recovery against the person erecting or continuing it.¹

SEC. 359. Benefits derived in any way by a person whose lands are injured by reason of the erection or continuance of a dam by being flooded or otherwise, cannot be considered in an action to recover for such injury. The act is in itself a nuisance, and there can be no set-off of benefits resulting therefrom, against the actual injury.²

In *Stout v. McAdams*, 2 Scam. (Ill.) 67, the defendant erected a dam across a stream that flowed through the land of the plaintiff located above the dam, and although producing no injury in the ordinary condition of the water, was yet so erected that upon the occurrence of severe storms it would throw the water back upon the plaintiff's land. The court held that every flowing back or throwing of water upon the lands of another is such an act as entitles the individual to an action for his damages; and though the erection of the dam in the first instance was lawful, yet if in its consequences it necessarily damages the property of another, or violates his right, it is a nuisance, and entitles the party injured to reparation for all the damage sustained by him.

SEC. 360. If a party seeks to avoid liability for damages arising from the flooding of lands on the ground of a license from the party injured, he must clearly establish a license to *flood* the land. It is not enough to show that the party consented to the construction of the dam, or that he even assisted in its construction unless he could then have known, or reasonably foreseen, that his land would be injured by the dam in the manner complained of.³

¹ *Stout v. McAdams*, 2 Scam. (Ill.) 67; *Plumleigh v. Dawson*, 1 Gil. (Ill.) 544; *Hill v. Ward*, 2 id. 285; *Rudd v. Williams*, 43 Ill. 385.

² *Gile v. Stevens*, 13 Gray (Mass.), 146.

³ *Bell v. Elliott*, 5 Black. (Ind.) 113. But see *Cain v. Hays*, 4 Dana (Ky.), 338, where it was held that where a person had consented to the erection of a dam this consent might be plead in bar in an action to recover for injuries sustained therefrom.

But in any event where a person under a misapprehension of the effects of an act has consented thereto, he may at once revoke the license, and thereafter the person to whom the license was given will be liable for all damages resulting therefrom.

Brown v. Bowen, 30 N. Y. 519; *Smith v. Scott*, 1 Kerr (New Brunswick), 1; *Allen v. Fiske*, 42 Vt. 462; *Freeman v. Hadley*, 33 N. J. 523; *Eatis v. China*, 56 Me. 407; *Eaton v. Winne*, 20 Mich. 156; *Hamilton v. Wudolf*, 36

If the dam itself is so erected as to produce damage to the lands of supra-riparian owners, it is a nuisance, and parties injured thereby are not estopped from a recovery for injuries therefor upon the ground of acquiescence in its construction, unless it could reasonably have been ascertained or foreseen at the time of its erection that it would produce the ill-results complained of. In this respect it stands precisely upon the same ground as any other nuisance, and the rule in reference to acquiescence therein, and estoppel by reason of acquiescence, is that, where a person acquiesces in the erection or maintenance of any thing that is a nuisance *per se*, or that he might reasonably have foreseen would become a nuisance, a court of equity will not interfere by injunction to relieve him from the effects thereof, but his remedy at law remains unless he has bound himself by grant or license sufficient in law to bar an action, or unless the party maintaining the nuisance has acquired a prescriptive right to maintain it. The law presumes that when a man assents to the doing of an act, he only assents to its being so done as not to injure him. The case of *Bankhardt v. Houghton*, 27 Beav. 425, is a case that fully illustrates the whole doctrine, and as it is a leading and well-considered case and difficult of access to the profession generally I will give the substance of it here. In that case the plaintiff claimed that as the defendant's termor had stood by and seen the works erected without objection, and the defendants had also seen them enlarging and extending their works without remonstrance or objection, they were thereby estopped from setting up a claim for damages upon the ground that the business was a nuisance as to them. The plaintiffs were engaged in the business of smelting copper, and in rendering the copper ore noxious vapors, injurious to vegetation

Md. 301; *Babcock v. Utter*, 1 Abb. (N. Y.) 27; *Miller v. State*, 39 Ind. 267; *Drake v. Wells*, 11 Allen (Mass.), 141; *Houston v. Laffer*, 46 N. H. 505; *Moye v. Tappan*, 23 Cal. 306; *Seldon v. Canal Co.*, 29 N. Y. 634; *Rhodes v. Otis*, 38 Ala. 578; *Dodge v. McClintock*, 47 N. H. 383; *Giles v. Simonds*, 15 Gray (Mass.), 441; *Duinnen v. Rich*, 22 Wis. 550; *Dempsey v. Kipp*, 63 Barb. (N. Y. S. C.) 311; *Druse v. Wheeler*, 22 Mich. 439. But, what is lawfully done under a license does not become unlaw-

ful by the forfeiture or revocation of the license. Where a person, under a license and in reliance thereon, has gone on and made large expenditures upon the land, the licensor is equitably estopped from revoking it to the damage of the licensee; and a court of equity will decree a specific performance. *Cook v. Prigdon*, 45 Ga. 331; *Pierson v. Canal Co.*, 2 Disney (Ohio), 100; *R. R. Co. v. McLauchan*, 59 Penn. St. 23.

and animal life, were liberated, and these exhalations and the deposits produced therefrom injured the vegetation in the vicinity, and in a great measure destroyed the feed in the pastures. It appeared that in 1849 the plaintiffs came into possession of some spelter and zinc works, called the Red Jacket works, in the county of Glanmorgan. Four years later, in 1853, the defendant became the occupant of two farms in the vicinity. One known as *Coed-y-Arl*, and the other *Coed-y-Arl Iskof*. The first nearly adjoined the plaintiffs' works. The nuisance went on increasing until 1856, when the defendant brought his action at law against the plaintiff for the injury done to his farm by the nuisance, and recovered a verdict of £450.

The plaintiff thereupon filed his bill in equity against the defendant, alleging that he had expended large sums of money in the enlargement and improvement of his works with the full knowledge and privity of the defendant's lessors, who, as the plaintiff alleged, had acquiesced in and encouraged it. The bill also alleged that the defendant, before he became the occupant of the premises, inspected the works, with a view of ascertaining the injury likely to be produced by them to the farms, and was fully aware of all the plaintiff's rights and claims of rights before he purchased, and asked for an injunction to restrain the enforcement of the judgment. The evidence did not sustain all the allegations of the bill, and rather established a passive non-interference than a direct acquiescence.

But it did appear that the *termor* and the tenants both knew of the existence of the works, and had taken no steps to prevent the manufacture or the enlargement of the works. In denying the prayer of the bill Lord JOHN ROMILLY, *Master of the Rolls*, delivered a masterly opinion which commends itself as an authority, because of the cogency of its reasoning and the soundness of its doctrine. "There are," he said, "two questions to be considered in this case. First, the extent of acquiescence alleged and proved; and second, the legal consequence of such acquiescence as is proved. On the first, as to the acquiescence, this is proved, and indeed not contested by the defendant. First, that the termor and the defendant, when he took the farm, were well aware of the extent of the works, and that the tenants who

assigned the lease to the defendant had seen them while they were being erected and did not take any steps to prevent the erection. These facts are very material for some purposes, and if the present case were reversed, and the defendant was here seeking to restrain the plaintiffs from permitting the vapors to issue from his furnace and to be deposited on his land, I should, on the facts, deem that the defendant was debarred from any right to obtain any such relief as is afforded by an injunction, and that he must be left to his remedy at law. The roasting furnaces are said to be those which produced the principal injury. The original number was small. I think three only. In 1853 they were increased to seven. The evidence shows that no damage was experienced until 1853, and that then it was very slight. I think it unreasonable to contend that, because a man has acquiesced in the erection of certain works which have produced little or no injury, he is not afterward to have any remedy, if, by increase of works, he sustains serious damage. I am unable to accede to this doctrine. It is warranted by no authority that I am aware of. It would follow that a partial obscuration of ancient lights, if assented to, involved a consent to their total obscuration, and that any easement assented to might be at any time increased at the pleasure of the grantee, provided it could be shown that the increase was only the probable consequence of the easement if found beneficial. But I do not assent even to the extent of the first limited statement of the proposition.

“It may well be that a person’s assent is given under an erroneous opinion, and in ignorance of the actual consequences. Is that mistake of fact to bind him forever after? I think not. The courts hold in cases of election, that a man is not bound by an election that he has made in ignorance of the real facts of the case. Undoubtedly there is this important consideration to be borne in mind in dealing with such cases. Whether the court can place both parties back in the same position that they were in when the first act was acquiesced in, on the one side, or done on the other. If it can, it may be the duty of the court to do so.

But, if the court cannot place both parties in the same position, its usual course is to decline all interference, and if the defendant was here asking for an injunction, I should, upon the

facts stated, leave him to his legal remedy. But it is error to suppose that the opposite of that proposition holds good, and that, because the court would not interfere to aid him, it will therefore interfere to aid the wrong-doer. In this instance I find that both parties were ignorant of the effects of the works; but if the plaintiff knew and the defendant did not, then the plaintiff would hold an undue advantage, against which the court would relieve him. But both being equally ignorant, is the defendant to be made to suffer for his ignorance more than the plaintiff? Why is his easement to works that did not then, and were never expected to, injure him, to confer on one the right to erect works in addition that will produce that result?

The evidence shows that the defendant's lessors never assented to the works as enlarged, and that his assent to the works was to the limited extent that they existed then, and such assent cannot be enlarged. If, when the assent was given, the consequences of the act assented to were obvious and plain, that would be one thing, but if the consequences were doubtful and not obvious, that is quite a different thing.

This may be easily illustrated. If a person permit me to open a window overlooking his close, he knows the exact consequences of that permission, namely, that he is liable forever after to be overlooked, and that he cannot ever after build on that close so as to obscure said window. This is the extent of the injury that can be produced, and he cannot say that he did not foresee it. So, if he allow another a right of way across his meadow, he knows and can actually estimate the injury that must follow. But if the tenant allows the lord of the manor to work the coals under the close of the copshold by offset out of the adjoining land, does it therefore follow, if the lord in mining the coal works so near the surface as to destroy the farm buildings, he is to have no remedy at law for the injury so done to him? Could the lord allege that the tenant must have known that the coal lay near the surface, and that such a result was probable, from its having often occurred in the neighborhood? Certainly not. But all such illustrations are weaker than the case before the court, and the strongest illustration of the distinction to be taken in such cases appears to be the case of works erected, which at first seem to be

innocuous, but which afterward become seriously injurious to the property of adjoining land owners. This is precisely the case where equity declines to interfere on *either* side and leaves the parties to their remedy at law."

SEC. 361. In *Brown v. Bowen*, 30 N. Y. 519, the effect of assent to the erection of a dam by a supra riparian proprietor was ably discussed and decided by the court, and as the case is of general interest upon this question I will give its main features here. The plaintiffs brought their action for injuries sustained by them by reason of the flooding of their premises by a mill-dam maintained by the defendants upon a stream that ran through the lands of both parties.

The defendant, among other things, denied all liability in the action because the dam was built by the plaintiff or by his assent and assistance, and this position was not denied by the plaintiff, so that the question as to the effect of these acts was directly before and passed upon by the court. Judgment having been given for the plaintiff the case came before the court of appeals for final determination, and MULLIN, J., in disposing of this branch of the case, said: "It is true that the dam was built with the assent of the plaintiffs, and it is quite probable one of them may have aided in the work. But it must be borne in mind that the defendants needed no assent from the plaintiffs to build a dam on their own side of the river, on their own land, provided that such dam caused no damage to the plaintiff's property. If the defendants proposed to so build their dam as to throw the water back on the plaintiffs' wheels, it is difficult to see why the plaintiffs should consent to the building of the dam, or to work on it without consideration. The probability is that the jury found that the plaintiffs' consent and aid were given on the condition that the work should be so done as not to injure the plaintiffs.

"It is said that the remedy of the plaintiffs is an action for breach of the agreement by the defendants to so build the dam as not to injure the plaintiffs. Technically, there was no such agreement, although doubtless the law might imply one if it was necessary, to prevent injustice, but the parties did not understand

that the rights of either party vested in agreement. The acts and assent of the plaintiffs might be treated as a parol license on condition, which condition has never been performed, and hence the license fails. But the facts proved do not amount to a license even.

“The consent of the plaintiffs, then, can only operate by way of estoppel, and it cannot thus operate because of the implied condition upon which such aid and assent were given.”

A question similar in all respects came before the New Brunswick courts in *Smith v. Scott*, 1 Kerr. (N. B.) 1.

In that case it appeared that the plaintiff was present at, and himself and servants assisted in the building of the dam. The dam, when erected; having set the water back upon his premises he brought this suit for damages. The defendant objected to a recovery against him, upon the ground that the plaintiff had assented to, and had aided in, the construction of the dam. The court held that the fact that the plaintiff aided in the construction of the dam could not be set up as an estoppel to his recovery for the damages resulting therefrom, unless there were reasonable grounds to believe that the effects would be injurious to his rights.

That the fact of his assent to the construction of the dam, and his aiding therein, were not evidence of his assent to the damaging of his lands, but that it was proper for the jury to consider these facts, to find whether he was aware of the extent of the effects that the dam would produce.

SEC. 362. When assent has been given to one by another to do an act, the natural and probable consequences of which are to produce a certain result, and the person to whom the assent is given goes on and expends money on the strength of the assent and makes erections of a permanent character, while the consent does not give any interest in the land, and at law is revocable at any time, even though given for a consideration, yet a court of equity will enforce it as an agreement, to give the right, in a case of fraud or great hardship, or will generally enjoin a party from revoking it. But it must be made to appear in such a case, to entitle a party to such relief, that the license has not been ex-

seeded, and that its exercise produces no more injury to the party than might have been reasonably foreseen or apprehended.

In *Veghte et al. v. The Raritan Water Power Co.*, 19 N. J. 142, this question was discussed by the court upon an application for an injunction to restrain the defendants from raising and tightening their dam on the Raritan river, by which it was claimed that a larger portion of the water of the river would be diverted than formerly.

The defendants set up a consent from the plaintiffs, or a part of them, to the diversion of the water, in writing, and the erection of works and the diversion of water under it. The chancellor says: "The consent in such case is only a license, at law or in equity. In general, a license at law will create no estate in the lands of the licensor, but will justify or excuse any acts done under it. It is revocable, even when given for a consideration. But in such cases where the revocation would be a fraud, courts of equity give a remedy, either by restraining the revocation or by construing the license as an agreement to give the right, and compelling a specific performance."¹

SEC. 363. As to the effect to be given to a license from one to do an act upon his land, at law, the court of New Jersey in the case of *Hetfield v. The Central R. R. Co.*, 5 Dutcher (N. J.),

¹ *Brown v. Bowen*, 30 N. Y. 543; *Foster v. Browning*, 4 R. I. 47. In *ex parte Coburn*, 1 Cow. (N. Y.) 568, the court say: "A license to enter on land for any purpose is not an interest therein; it is a mere authority, personal, to the grantee, and revocable at the will of the grantor."

In *Wolfe v. Frost*, 4 Sand. Ch. (N. Y.) 72, the court thus defines the distinction between an easement and a license: "An easement is a privilege without profit, which the owner of one neighboring tenement has of another by prescription, or by grant, by which the servient owner is obliged to suffer, or not to do something on his own lands for the advantage of the dominant owner."

"An easement is an incorporeal hereditament, and passes with the dominant tenement by grant or succession, and the servient tenement is

transmitted in the like manner subject to the easement.

"But a license is an authority to do a particular act or series of acts upon another's land, without possessing any interest therein. A license, when executed, will prevent the owner of the land from maintaining an action for an act done under it, but it is revocable at pleasure, and will not be a defense for an act done after it is revoked." See also *Bridges v. Purcell*, 1 Dev. & Bat. (N. C.) 492; *Hull v. Babcock*, 4 Johns. (N. Y.) 418. In *Mumford v. Whitney*, 15 Wend. (N. Y.) 379, the whole doctrine of license is ably discussed by SAVAGE, J., and will be found a full authority for the doctrine stated above. *Houston v. Laffee*, 46 N. H. 508; *Cook v. Prigden*, 45 Ga. 331; *Pierson v. Canal Co.*, 2 Disney (Ohio), 100; *R. R. Co. v. McLaughan*, 59 Penn. St. 23.

571, is in point. In that case the charter of the defendant authorized them to enter upon and take the lands required for their road, but directed that they should not enter without the consent of the owner. The defendant entered upon the plaintiff's lands by his consent, but did not take any conveyance from him in the manner required by law, in order to give them right or title. The court held that this consent did not dispense with the necessity of a deed or conveyance of the land or right, in the form required by law. That it was not a consent that was intended to confer a title, and was revocable.

In *Wood v. Ledbitter*, 13 M. & W. 837, the question as to the effect of a license arose in an action of assault and battery. The evidence disclosed that the plaintiff purchased a ticket for the sum of one guinea, which entitled him to admission to the grandstand. That the Earl of Ellington was one of the stewards of the races, and that the tickets were issued by the stewards, but were not signed by Lord Ellington. That under this ticket the plaintiff entered the ground on one of the race days, when the defendant, who was a policeman, under the directions of Lord Ellington, who first ordered him to leave, upon his refusing to do so committed the assault complained of, using no more force than was necessary for that purpose. Upon the trial the judge directed the jury that, assuming the ticket to have been sold to the plaintiff under the sanction of Lord Ellington, it still was lawful for Lord Ellington, without returning the guinea, to order the plaintiff to quit the inclosure, and that after a reasonable time had elapsed, if he failed to leave, then the plaintiff was not on the ground by the leave and license of Lord Ellington, and the defendant would be justified in removing him under his orders, and this ruling was sustained in Exchequer.

In *Miller v. The Auburn & Syracuse R. R. Co.*, 6 Hill (N. Y.), 61, which was a case somewhat similar to that of *Hetfield v. Th Central R. R. Co.*, before referred to, the defendants erected their railroad with an embankment upon Garden street in Auburn, interrupting the plaintiff's access to his premises, in 1839, and maintained it until 1842, when this suit was brought. The defendants offered to prove that the embankment was raised under a parol license from the plaintiff, but the proof was excluded by

the court, and the case was heard in the supreme court upon the question of the admissibility of that evidence. COWEN, J., among other things, said: "If what the defendants in this case proposed to show was true, viz., that the plaintiff verbally authorized the making of the railway, while the authority remained, their acts were not wrongful. License is defined to be a power or authority. So long as the license was not countermanded, the defendants were acting in the plaintiff's own right."

In this case the court uphold a license as a defense until it is revoked, and hold that it must be revoked before an action can be brought; but in *Veghte v. The Raritan Power Co.*, ante, the court held that the bringing of the action is a revocation of itself, and all that is necessary. But the former would seem to be the better rule, and the one generally adopted. The following authorities will be found applicable upon the question of the effect of a license.¹

¹ Ex parte Coburn, 1 Cow. (N. Y.) 570; Cook v. Stearns, 11 Mass. 533; Ruggles v. Lesure, 24 Pick. (Mass.) 190; Prince v. Case, 10 Conn. 375; Rex v. Herndon-on-the-hill, 4 M. & S. 565; Fentiman v. Smith, 4 East, 107; Hewlins v. Shipman, 5 B. & C. 222; Bryan v. Whistler, 8 id. 288; Cacker v. Cowper, 1 C. M. & R. 418; Wallis v. Harrison, 4 M. & W. 538. It has been held in some of the cases that the effect of a license executed, as for instance to enter upon land to erect a house or dam, and followed by user, is to give the licensee a right to personal property upon the land of the grantor, and although revocable at will, yet the licensee can enter for its removal although not to maintain or use the property there. That the license is irrevocable as to the right to remove the property. Barnes v. Barnes, 6 Vt. 388; Prince v. Case, ante; Van Ness v. Packard, 2 Pet. (U. S.) 143; Cary v. Ins. Co., 10 Pick. (Mass.) 540; Marcy v. Darling, 8 id. 283.

There are a class of cases, however, particularly in Pennsylvania, where it is held that where acts have been done in pursuance of a license and relying upon it, the license operates as an equitable estoppel, and the licensor will be estopped from revoking it to the injury of the licensee, so long as

the license is not exceeded. But that for all excess of use an action may be maintained. Bridge Co. v. Bragg, 11 N. H. 102; Lefevre v. Lefevre, 4 S. & R. (Penn.) 241; Ricker v. Kelly, 1 Greenl. (Me.) 117; Hepburn v. McDowell, 17 S. & R. (Penn.) 383; Cook v. Prigdon, 45 Ga. 331; 12 Am. R. 582; Houston v. Laffe, 46 N. H. 608.

In *Selden v. Delaware & Hudson Canal Co.*, 29 N. Y. 634, where defendants entered upon the lands of plaintiff by parol license from him, and enlarged the same, it was held that the license operated as a defense to all that had been done under it, but would not justify a maintenance of the same after the license is revoked. The same was also held in *Mumford v. Whitney*, 15 Wend. (N. Y.) 380; *Foot v. N. H. & Northampton Co.*, 23 Conn. 214; *Eggleston v. N. Y. & H. R. R. Co.*, 35 Barb. (N. Y. Sup. Ct.) 162. In *Woodard v. Seeley*, 11 Ill. 157, it was held that a license by deed or parol is always revocable, unless coupled with an interest and executed, and that then it is irrevocable.

In *Kimball v. Yates*, 14 Ill. 464, it was held that a parol license to cross a man's farm is revocable at any time at the will of the licensor.

SEC. 364. The case of *Roberts v. Rose*, 1 Exch. (L. R.) 82, is a leading case both upon the effect of a license, the right to revoke it, and the right of parties to abate nuisances affecting their individual rights.

In that case it appeared that the plaintiffs were the lessees of a colliery called the Bank Colliery, and that in 1861 they obtained from the owner of the fee of the adjoining lands written permission to make a water-course from their colliery to an old pit in what was called the Broadwater Colliery. A part of the surface of the Broadwater colliery was at that time in possession of a tenant, and the plaintiffs also procured a license from him to build and maintain the water-course in question, and the tenant also used the water-course for the prosecution of the business of brick making. Shortly after the water-course was built, the plaintiffs were required by the owners of the fee to extend the water-course over the spoil banks of the old pit, so as to join another water-course that had formerly been built to carry away the waters from the Broadwater colliery, and which was discharged into a neighboring canal.

The premises over which the water-course extended were subject to mortgage, and early in 1861, but after the water-course was built, the defendants leased the Broadwater colliery of the mortgagors. The lease was of the coal in or under the land, and leave was given to the defendant to occupy such parts of the lands as might be necessary for the due carrying on of the coal mines, and also to make use of the water-courses over the land. The lessors reserved the right to make water-courses for certain mines on the land, proper compensation being made to the lessees therefor.

The defendant, on entering into possession, assented to the continuance of the plaintiffs' water-course, and certain changes were made therein at the defendant's request, and the extension thereof was also made as required by the owner of the fee.

In 1863 the defendant applied to the plaintiffs for a money payment in consideration of their use of the water-course, but the plaintiffs refused to comply with their demand, insisting that, under their license from the owner of the fee, they were entitled to continue their water-course as it was.

The defendants thereupon gave them notice that the water-course must be discontinued, and the plain'iffs, not having discontinued it, the defendant stopped up the water-course on the lands of the tenant, from whom the plaintiffs had license, near the boundary of the premises occupied by the plaintiffs. The result of this obstruction was to pen back and throw the water pumped from the plaintiff's mines back upon the plaintiff's premises, and by its accumulation there it percolated through the soil into their mines.

The court held that the license to the plaintiffs was revocable, and, having been revoked, deprived them of the right to maintain the water-course, but that the defendant was bound to adopt a reasonable mode of abating the nuisance, and so as to do no unnecessary or unreasonable damage, and if the mode adopted by him was unreasonable and unnecessary he would be liable. A verdict was found for the plaintiff, upon the ground that the obstruction of the water was unreasonable and unnecessary at the point where it was made, and upon hearing on exceptions in exchequer, the verdict was sustained.

SEC. 365. It is an actionable nuisance to flood the lands of a lower riparian owner, or other person, by an unnatural or spasmodic discharge of water from a dam, or by reason of the giving way of the dam, or any other artificial contrivance for pressing back, or holding the water in quantities beyond its usual volume in the bed of the stream, or in a pond used for that purpose, or by bringing into a stream the waters of another stream, or from other sources that would not naturally flow there, except such surface waters or waters arising from the lawful drainage of lands bordering on the stream. A mill owner who thus brings water into a stream from unnatural or unusual sources, is entitled to the use of that quantity of water in addition to the quantity belonging to him by virtue of his natural right or otherwise; but the bringing of the water there is an actionable nuisance to those below him on the stream, even though they sustain no actual damage; for they have a right to the natural flow of the stream, and without addition or diminution, and any interference with this natural right is clearly within the idea of

a nuisance. By long user in using the stream for the discharge of the water thus artificially brought into it, the wrong-doer would acquire the right thus to discharge it, and would thus to this extent create a servitude upon all the estates below him.

Therefore, the act is actionable without special damage. But if, by reason of the bringing off this water into the stream before an easement to that extent is acquired, any person below him on the stream sustains a special injury, he is answerable therefor, and no degree of care exercised by him, will shield him from liability. He is a wrong-doer *ab initio*, and his act continues wrongful until it ripens into a legal right by long user in the manner necessary to acquire the right.¹

So, too, it is the right of every riparian owner to drain his lands into the stream flowing through them, and the erection of a dam below, that interferes with this right, is a nuisance, and the person injured thereby may abate so much of the dam as is necessary to secure his rights,² and if the dam sets back the waters so that they become stagnant, and interfere with the health of the people, it is both a public and a private nuisance, and is actionable and indictable as such.³

¹ *Mabie v. Matthewson*, 17 Wis. 1; *Townsend v. People*, 3 Hill (N. Y.), 479; *State v. Stoughton*, 5 Wis. 291; *Bailey v. Mayor, etc.*, 3 Hill (N. Y.), 531; *Lapham v. Curtis*, 5 Vt. 371. *Rooker v. Perkins*, 14 id. 79; *Com.*

² *Hastings v. Livermore*, 7 Gray (Mass.), 194; *Treat v. Bates*, *ante*; *Waffle v. R. R. Co.*, 58 Barb. (N. Y. S. C.) 413. *v. Webb*, 6 Rand. (Va.), 726; *Miller v. Trueheart*, 4 Leigh. (Va.) 529; *Day v. State*, 4 Wis. 387; *Spencer v. Com.*, 2 Leigh. (Va.) 759; *Munson v. The People*, 5 Parker's Cr. (N. Y.) 16.

³ *Treat v. Bates*, 27 Mich. 360; *People*, 5 Parker's Cr. (N. Y.) 16.

CHAPTER NINTH.

DIVERSION AND DETENTION OF WATER.

SEC. 366. Diversion of water.

367. Disturbance of natural flow of water, actionable.

368. Detention of water.

369. Rights as between mill owners.

370. Rule in *Pollitt v. Long*.

371. Reasonableness of detention, question of fact for a jury.

372. Effect of restrictions by grant.

373. When restrictions are imposed by *acts* of the parties.

374. Uses in excess of natural right.

375. Right to use water for purposes of irrigation.

376. Rule in *Van Hoesen v. Coventry*.

SEC. 366. The diminution of the water of a stream by diverting it from its natural channel and not returning it thereto is a violation of the rights of lower riparian owners, amounting to a nuisance, for which an action will lie against the party making the diversion. No actual damage need be sustained in order to uphold an action, as it is the injury to the right that forms the gist of the complaint. Injuries of this character were recognized as actionable nuisances at a very early date. In *Luttrell's Case*, 4 Coke, 86, this question was discussed by the court, and it was held, that while a person who had acquired a prescriptive right to the use of water in a particular manner might use the same quantity in any other way, yet he might not divert any part of the water from the stream, so that it would not go to the proprietors below in its usual flow and volume. And this doctrine was held in all the early cases. The distinction between the early and modern cases arises simply from the fact that in the early cases parties were held up to the exercise of strictly natural rights, while in the modern cases, the rule is so far extended as to protect a person in his use of the water for any purpose, so long as he does not in any measure prevent the beneficial use of it by an owner below him on the stream.¹

¹ In *Parke v. Kilham*, 8 Cal. 77, the court say that it is as much a nuisance to turn aside from one's premises a useful element, as to turn upon them one that is destructive, and that a ditch that diverts the water rightfully

flowing to a mining claim is as much a nuisance as a dam that floods it. *Oliver v. Fenner*, 2 Durfee (R. I.), 215.

In *Wadsworth v. Tilotson*, 15 Conn. 369, it was held that a diversion of the water reasonably necessary for domes-

In *Webb v. Portland Manufacturing Co.*, 3 Sum. (C. C. U. S.) 189, which was heard before Judge STORY who delivered the opinion in the case, and which is a leading case upon this subject, it appeared that on the Presumpscot river, in the State of Maine, there were two falls near each other, upon which were erected mill-

tic uses, and a reasonable use of water for other purposes, is not a nuisance, and that the question of reasonableness is always for the jury. *Gillett v. Johnson*, 30 Conn. 183; *Evans v. Merriweather*, 3 Scam. (Ill.) 492. See *Bliss v. Kennedy*, 43 Ill. 73; *Ferrea v. Knipe*, 28 Cal. 344; *Johns v. Stevens*, 3 Vt. 308; *Blanchard v. Baker*, 8 Me. 253; *Stein v. Burden*, 29 Ala. 127; *Smith v. Adams*, 6 Paige (N. Y. Ch.), 435; questioned in *Trustees v. Youmans*, 50 Barb. (N. Y. Sup. Ct.) 319; *Elliott v. Fitchburgh R. R. Co.*, 10 Cush. (Mass.) 191; *Pugh v. Wheeler*, 2 Dev. & B. (N. C.) 50.

Bealey v. Shaw, 6 East. 208; *Corn- ing v. Troy*, 34 Barb. (N. Y. S. C.) 485.

In *Kidd v. Laird*, 15 Cal. 161, it was held that where a person had acquired a right by grant from the United States government to divert water from a running stream, with no restrictions as to the point from which it should be taken, the place of diversion or the mode of use might be changed at any time, if no one was injured thereby. But when the rights of others are affected thereby no change can be made. See, also, *Butte v. Morgan*, 19 Cal. 609; *Mitchell v. Parks*, 26 Ind. 354; *Pratt v. Lawson*, 2 Allen (Mass.), 275; *Arthur v. Case*, 1 Paige Ch. (N. Y.) 448; *Curtis v. Jackson*, 13 Mass. 507; *Webb v. Portland Manuf. Co.*, 3 Sum. (U. S.) 187; *Vanderbergh v. Van Bergen*, 13 Johns. (N. Y.) 212.

In *Crocker v. Bragg*, 10 Wend. (N. Y.) 260, an island divided the stream so that only a small portion of it descended on the defendant's side of the island and the balance on the other side. The defendant placed obstructions at the head of the island for the purpose of diverting more of the water of the stream to his side. The court held that each owner was entitled to all the water that naturally descended to him, and that where there was a natural barrier that divided the stream, neither owner could erect obstructions to change the natural course of the water. But the water of a stream may be diverted on one's own land if it is returned again to its origi-

nal channel without sensible diminution to the injury of those lower down on the stream. *Norton v. Valentine*, 14 Vt. 239; *Johnson v. Lewis*, 13 Conn. 303.

Water may be diverted by sluices or artificial channels for a reasonable use, and no liability attaches for that insensible loss of the water consequent upon its reasonable beneficial use. *Wadsworth v. Tillotson*, 15 Conn. 366.

The diversion or obstruction of water, in order to be actionable, must be such as to injure the lower owners, and no prescriptive right can be acquired unless such use does operate injuriously. But the diversion or obstruction of *all* the water is actionable, or of such a quantity as sensibly diminishes its natural flow. *Davis v. Fuller*, 12 Vt. 178; *Norton v. Valentine*, 14 Vt. 230; *Parker v. Hotchkiss*, 25 Conn. 321; *Webster v. Flemming*, 2 Humph. (Tenn.) 518; *Plumleigh v. Dawson*, 1 Gilman (Ill.), 544; *Miller v. Lapham*, 44 Vt. 416; *Snow v. Parsons*, 28 Vt. 49. But when the diversion is by one who has no legal right to make it, an action may be maintained by a riparian owner, even though no actual damage is sustained. *Whipple v. Cumberland Manufacturing Co.*, 2 Story (U. S.), 661; *Butman v. Hussey*, 3 Fairfax (Va.), 407.

In *Parker v. Griswold*, 17 Conn. 288, it was held that, in order to maintain an action for diversion, it is not necessary to allege that the plaintiff had a mill upon his premises, but that an allegation of injury to the land is sufficient. *Leggett v. Kenton*, 2 Rich. (S. C.) 456. But the injury must be perceptible, and not merely theoretical. *Thompson v. Crocker*, 9 Pick. (Mass.) 59; *Merritt v. Parker, Coxe* (N. J.), 46; *Pugh v. Wheeler*, 2 Dev. & Bat. (N. C.) 56; *Omelyany v. Jagers*, 2 Hill (N. Y.), 684. Diverting water for purposes of irrigation is unlawful, when. *Anthony v. Lapham*, 5 Pick. (Mass.) 175; *Weston v. Alden*, 8 Mass. 186; *Arnold v. Foot*, 12 Wend. (N. Y.) 330.

dams, which were called upper and lower mill-dams. The distance between these dams was only about forty feet, and the water therein constituted the pond of the lower dam. The defendants were the owners of a cotton factory on the left bank of the river, and the plaintiffs were the owners of several mills and mill privileges on the lower dam. The defendants opened a canal to supply water to work their mill into the pond immediately below the upper dam, and the water thus diverted was returned into the stream below the plaintiff's dam. The defendants claimed that they had the right to divert the water in this manner by means of the canal, because the water so by them withdrawn was only about one-fourth part of the amount to which, as mill-owners on the stream, under their right, they were entitled; but the learned judge repudiated this claim, and held that both parties were entitled to their proportion of the whole stream upon its arrival at the dam, and that neither party could divert it so that it would not reach the destination at the dam, where the parties were entitled to have it come, and that it made no difference that the quantity so diverted was much less than the party had a right to use as an owner upon the dam, as his diversion of the water, however small in quantity, was in violation of the rights of other owners, and that the fact that the defendants had increased the quantity of water by the erection of a reservoir, was no answer to the suit for damage, and no palliation for an infringement of the rights of the plaintiff. In delivering the opinion of the court, STORY, J., said: "The true doctrine is laid down by Sir JOHN LEACH,¹ in regard to riparian proprietors, and his opinion has since been deliberately adopted by the King's Bench.² *Prima facie* (says that learned judge), the proprietor of each bank of a stream is the proprietor of half the land covered by the stream; but there is no property in the water. Every proprietor has an equal right to use the water which flows in the stream; and consequently no proprietor can have the right to use the water to the prejudice of any other proprietor, without the consent of the other proprietors, who may be affected by his operations, no proprietor can either diminish the quantity of water, which would otherwise descend to the proprietors below, nor throw the water back upon the pro-

¹Wright v. Howard, 1 Sim. & Stu. 190. C., 5 id. 1. See, also, Bealey v. Shaw,

²Mason v. Hill, 3 B. & Ad. 304; S. 6 East, 208.

prietors above. Every proprietor who claims a right, either to throw the water back above, or to diminish the quantity of water which is to descend below, must, in order to maintain his claim, either prove an actual grant or license from the proprietors affected by his operations, or must prove an uninterrupted enjoyment of twenty years, which term of twenty years is now adopted upon a principle of general convenience, as affording conclusive presumption of a grant." The same doctrine was fully recognized and acted upon in the case of *Tyler v. Wilkinson*,¹ and also in the case of *Blanchard v. Baker*.² In the latter case the learned judge (Mr. Justice WESTON), who delivered the opinion of the court, used the following emphatic language: "The right to the use of a stream is incident or appurtenant to the land through which it passes. It is an ancient and well-established principle that it cannot be lawfully diverted, unless it is returned again to its accustomed channel before it passes the land of a proprietor below. Running water is not susceptible of an appropriation, which will justify the diversion or unreasonable detention of it. The proprietor of the water-course has a right to avail himself of its momentum as a power, which may be turned to beneficial purposes." ³

Mr. Chancellor KENT has also summed up the same doctrine, with his usual accuracy, in the brief, but pregnant, text of his Commentaries,⁴ and I scarcely know where else it can be found reduced to so elegant and satisfactory a formulary. In the old books the doctrine is quaintly though clearly stated; for it is said that a water-course begins *ex jure naturæ*, and having taken a certain course naturally, it cannot be (lawfully) diverted. *Aqua currit, et debet currere solebat*.⁵ The same principle applies to the owners of mills on a stream. They have an undoubted right to the flow of the water, as it has been accustomed of right and naturally to flow to their respective mills.

The proprietor above has no right to divert, or unreasonably to retard this natural flow to the mills below; and no proprietor

¹ *Tyler v. Williamson*, 4 Mason, 397, 400, 401, 402.

² *Blanchard v. Baker*, 8 Greenl. 253, 266.

³ The case of *Mason v. Hill*, 5 B. & Ad. 1, contains language of an exactly similar import, used by Lord DENMAN

in delivering the opinion of the court. See, also, *Gardner v. Village of Newburgh*, 2 Johns. Ch. 162.

⁴ 3 Kent's Com., § 42, p. 439, 3d ed.

⁵ *Shurry v. Pigott*, 3 Bulst. 339; *S. C.*, Popham, 166.

below has a right to retard or turn it back upon the mills above, to the prejudice of the right of the proprietors thereof. This is clearly established by the authorities already cited, the only distinction between them being that the right of a riparian proprietor arises by mere operation of law, as an incident to his ownership of the bank, and that of a mill owner, as an incident to his mill.¹ Mr. Chancellor KENT, in his Commentaries, relies on the same principles, and fully supports them by a large survey of the authorities.²

Now if this be the law on this subject, upon what ground can the defendants insist upon a diversion of the natural stream from the plaintiff's mills, as it has been of right accustomed to flow thereto? First, it is said that there is no perceptible damage done to the plaintiffs. That suggestion has been already, in part, answered. If it were true, it could not authorize a diversion, because it impairs the right of the plaintiffs to the full, natural flow of the stream, and may become the foundation of an adverse right in the defendants. In such a case actual damage is not necessary to be established in proof. The law presumes it. The act imports damage to the right, if damage be necessary. Such a case is wholly distinguishable from a mere fugitive, temporary trespass, by diverting or withdrawing the water a short period, without damage and without any pretense of right. In such a case the wrong, if there be no sensible damage, and it be transient in its nature and character, as it does not touch the right, may possibly (for I give no opinion on such a case) be without redress at law, and certainly it would found no ground for the interposition of a court of equity by way of injunction.

But I confess myself wholly unable to comprehend how it can be assumed in a case like the present, that there is not and cannot be an actual damage to the right of the plaintiffs.

What is that right? It is the right of having the water flow in its natural current at all times of the year to the plaintiff's mills. Now, the value of the mill privileges must essentially depend, not merely upon the velocity of the stream, but upon the head of water, which is permanently maintained. The necessary result of lowering the head of water permanently, would

¹ *Bealey v. Shaw*, 6 East, 208; *Saunders v. Newman*, 1 B. & Ald. 253; *Mason v. Hill*, 3 id. 304; S. C., 5 id. 1; *Blanchard v. Baker*, 8 Greenl. 253, 268; *Tyler v. Wilkinson*, 4 Mason, 397, 400-405.

² 3 Kent's Com., § 52, p. 441-445, 3d ed.

seem, therefore, to be a direct diminution of the value of the privileges, and, if so, to that extent it must be an actual damage.

Again, it is said that the defendants are mill owners on the lower dam, and are entitled, as such, to their proportion of the water of the stream in its natural flow. Certainly they are. But where are they so entitled to take and use it? At the lower dam; for there is the place where their right attaches, and not at any place higher up the stream. Suppose they are entitled to use, for their own mills on the lower dam, half the water which descends to it, what ground is there to say that they have a right to draw off that half at the head of the mill pond?

Suppose the head of water at the lower dam in ordinary times is two feet high, is it not obvious that by withdrawing at the head of the pond one-half of the water, the water at the dam must be proportionally lowered? It makes no difference that the defendants insist upon drawing off only one-fourth of what they insist they are entitled to; for, *pro tanto*, it will operate in the same manner; and if they have a right to draw off to the extent of one-fourth of their privilege, they have an equal right to draw off to the full extent of it. The privilege attached to the mills of the plaintiff, is not the privilege of using half, or any other proportion merely, of the water in the stream, but of having the whole stream, undiminished in its natural flow, come to the lower dam with its full power, and there to use the full share of the water-power. The plaintiff has a title, not to a half or other proportion of the water in the pond, but is entitled, if one may say so, *per my et per tout* to his proportion of the whole bulk of the stream, undivided and indivisible, except at the lower dam. This doctrine, in my judgment, irresistibly follows from the general principles already stated; and, what alone would be decisive, it has the express sanction of the supreme court of Maine, in the case of *Blanchard v. Baker*.¹ The court there said, in reply to the suggestion that the owners of the eastern shore had a right to half the water, and a right to divert it to that extent: "It has been seen that if they had been owners of both sides, they had no right to divert the water without again returning it to its original channel (before it passed the lands of another proprietor). Besides, it was impossible, in the nature of things, that they

¹ *Blanchard v. Baker*, 8 Greenl. (Me.) 253. 270.

could take it from their side only. An equal portion from the plaintiff's side must have been mingled with all that was diverted."

A suggestion has also been made that the defendants have fully indemnified the plaintiff from any injury, and in truth have conferred a benefit on him, by securing the water by means of a raised dam higher up the stream, at Sebago Pond, in a reservoir, so as to be capable of affording a full supply in the stream in the driest seasons. To this suggestion several answers may be given. In the first place the plaintiff is no party to the contract for raising the new dam and has no interest therein, and cannot, as a matter of right, insist upon its being kept up, or upon any advantage to be derived therefrom. In the next place, the plaintiff is not compellable to exchange one right for another; or to part with a present interest in favor of the defendants at the mere election of the latter. Even a supposed benefit cannot be forced upon him against his will; and, certainly, there is no pretense to say that, in point of law, the defendants have any right to substitute, for a present existing right of the plaintiffs, any other which they may deem to be an equivalent. The private property of one man cannot be taken by another simply because he can substitute an equivalent benefit."

In *Arthur et al. v. Case et al.*, 1 Paige Ch. (N. Y.) 447, this question was considered by Chancellor WALWORTH.

In that case the plaintiffs were the owners of a mill privilege upon one side of a stream, and the defendants upon the other of what was known as the lower falls in Ticonderoga. There was an island in the middle of the outlet of the stream, and the current of the stream naturally ran on the north side of the island. A dam extended to the south shore, on which the defendants' mills were located, and a similar dam extended from the island to the south shore, on which the plaintiff's mills were located. The defendants claimed that they had a right to have their mills supplied first, as in dry seasons there was not enough water to supply all the mills, and commenced building a dam from the island to the north shore, some distance above the dam that there existed, the natural and necessary effect of which would be to deprive the plaintiffs of water in dry seasons, and during such periods to turn the whole stream to the south side of the island. The plaintiffs brought their bill for an injunction, and upon a

hearing on a motion to dissolve the temporary injunction obtained by them, the learned chancellor said: "It is a general principle that persons owning lands on the different sides of a stream, hold to the centre thereof, or to the middle of the water."¹

"And where hydraulic works are erected on both banks, if there is not sufficient water to afford a full supply for all, the owner on each side is entitled to an equal share of the waters, or so much thereof as is necessary for his mills, if less than a moiety is sufficient. If the owner of the mills on either side has been in the quiet enjoyment of the water privilege, and the other attempts to deprive him of it and thus destroy his mills, a preliminary injunction is proper, as the injury might be irreparable."²

"In this case the court must see that the erection of the dam in the manner proposed, will entirely cut off the water from the complainant's mills, except when the stream is so high as to run over the dam. * * * The parties, in the absence of any provisions to the contrary, in their grants are entitled to participate equally in the use of the water; and if either draws more than a fair proportion, or if it is necessary to excavate in the bed of the river, to give the defendants a fair proportion, the manner of exercising the right, and the extent and nature of the excavation, must be settled under the rule adopted by the Master of the Rolls, in *Martin v. Stiles*, Mol. 144."

SEC. 367. Thus it will be seen that each mill owner, as well as riparian owner, is entitled to the natural flow of the stream in quantity and current. If the bed of the stream, from natural causes, such as floods, tempests, or the deposit of *debris* or earth in the bed of the stream, prevents the natural flow of the water to their mills, these may be removed; but no removal of the earth forming the natural bed of the channel of the stream must thereby be disturbed, to the detriment of any other mill owner. So, where there is a rock in the bed of the stream which prevents the free passage of the water to the mill of an owner upon either bank of the stream, he has no right to remove the same, or any part thereof, to the injury of another owner on the stream.³

¹ Ex parte Jennings, 6 Cow. (N. Y.) 518.

² Robinson v. Lord Byron, 1 Brown's Ch. 588; Same v. Newdegate, 10 Vesey, Jr., 193.

³ In Norton v. Valentine, 14 Vt. 239 it was held that it is competent for a mill owner to deepen his channel or do any other act he chooses upon his own land, provided that he does not thereby

It may be stated here that every riparian owner has a right to use the water flowing through his land, for domestic purposes, such as furnishing water for culinary use, the watering of his cattle, and for the proper irrigation of his land; and that he has a right to use so much of the water as is essential for *domestic* use, even though it takes all the water of the stream.¹ But for the purposes of irrigation, his use must be such as not essentially to interfere with the natural flow of the stream, or as to diminish the quantity of water that goes to the proprietors below.²

In *Embrey v. Owen*, 4 Eng. Law & Eq. 466, this question was ably discussed by the court, and what seems to be the true rule in such cases was established.

In that case the defendant was a *supra* riparian owner, and in times when the river was full he detained a portion of the water of the stream for the purpose of irrigating his land. It appeared that his use of the water was reasonable, and did not in perceptible degree diminish the quantity of water in the stream or interfere with the plaintiff's rights, or the rights of other owners below him on the stream. But the plaintiff conceiving that this use of the water was an infringement of his right brought his action. PARKE, B., delivered the opinion of the court and said: "We are not prepared to say that the learned judge at *nisi prius* was correct in his interpretation of the word 'unappreciable' when connected with the word 'quantity,' nor are we sure that he was not; for the word 'unappreciable' or 'inappreciable' is

¹ injuriously affect the rights of others on the stream. See also *Ford v. Whitlock*, 27 Vt. 265; *Stein v. Burden*, 29 Ala. 127. In *Hulme v. Shreive*, 3 Green. Ch. (N. J.) 116, the defendant cut channels and straightened the channel of a stream running through his land, thus increasing the current of the stream, and cutting off the pondage of mill owners below, acquired by the check in the momentum of the water by its windings and turnings through the old channel. The court held that, although the stream was turned wholly on the defendant's own land, and that he had not thereby diminished the quantity of water flowing to the lower owner, yet, as he had thereby increased the *momentum* of the water he had interfered with the rights of lower owners to the *natural flow*,

and he was enjoined from maintaining the stream in the artificial channel.

See *Brown v. Bush*, 45 Penn. St. 64, where these rights are ably discussed, ¹ *Blanchard v. Baker*, 8 Me. 253; *Stein v. Burden*, 29 Ala. 127; *Evans v. Merriweather*, 3 Scam. (Ill.) 492.

² *Sampson v. Hoddinott*, 1 C. B. (N. S.) 590; *Miller v. Miller*, 9 Penn. St. 74; *Croaker v. Bragg*, 10 Wend. (N. Y.) 264; *Arnold v. Foot*, 12 id. 330; *Gillett v. Johnson*, 30 Conn. 180. But the uses of water for the purposes of irrigation in sections where it is rendered indispensable by reason of the extraordinary dryness of the seasons is upheld by the court upon the ground of paramount necessity. Not in pursuance of common-law principles, but in defiance of and in spite of them. *Union Mills Co. v. Ferris*, 2 Sawyer's C. C. (U.S.) 184.

one of a new coinage not to be found in Johnson's dictionary, or in Richardson's. * * * *

"The important question arises on the plea of not guilty, the jury having found that no sensible diminution of the actual flow of the stream to the plaintiffs' mill was caused by the obstruction of the water. That the working of the mill was not in the least impeded was clear on the evidence. On that finding we think the verdict was properly ordered for the defendants." It was very ably argued before us by the learned counsel for the plaintiffs, that the plaintiffs had a right to the full flow of the water in its natural course and abundance, as an incident to their property in the land through which it flowed; and that any abstraction of the water, however inconsiderable, by another riparian proprietor, and though productive of no actual damage, would be actionable because it was an injury to a right, and if continued would be the foundation of a claim of adverse right in that proprietor.

We by no means dispute the truth of this proposition with respect to every description of right. Actual perceptible damage is not indispensable as the foundation of an action; it is sufficient to show the violation of a right, in which case the law will presume damage — *injuria sine damno* is actionable — as was laid down in the case of *Ashby v. White*, 2 Ld. Raym. 938, by Lord Holt, and many subsequent cases; which are all referred to, and the truth of the proposition powerfully enforced in a very able judgment of the late Mr. Justice Storry, in *Webb v. The Portland Manufacturing Company*, 3 Sumn. 189. But in applying this admitted rule to the case of rights to running water, and the analogous cases of rights to air and light, it must be considered what the nature of those rights are and what is a violation of them.

The law as to flowing water is now put on its right footing by a series of cases.¹

The right to have the stream to flow in its natural state without diminution or alteration is an incident to the property in the land through which it passes; but flowing water is *publici juris*, not in the sense that it is a *bonus vacans*, to which the first occu-

¹ *Wright v. Howard*, 1 Sim. & S. 190; 472. And is well settled in the American courts. See 3 Kent's Com., § 52, *Wood v. Waud*, 3 Exch. 748; 13 Jur. 439-445.

pant may acquire an exclusive right, but that it is public and common in this sense only, that all may reasonably use it who have a right of access to it, that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only.' But each proprietor of the adjacent land has the right to the usufruct of the stream which flows through it.

This right to the benefit and advantage of the water flowing past his land, is not an absolute and exclusive right to the flow of all the water in its natural state; if it were, the argument of the learned counsel, that every abstraction of it would give a cause of action, would be irrefragable; but it is a right only to the flow of the water, and the enjoyment of it subject to the similar rights of all the proprietors of the banks on each side to the reasonable enjoyment of the same gift of Providence.

It is only, therefore, for an unreasonable and unauthorized use of this common benefit that an action will lie; for such a use it will; even, as the case above-cited from the American Reports shows, though there may be no actual damage to the plaintiff. In the part of Kent's Commentaries to which we have referred, the law on this subject is most perspicuously stated, and it will be of advantage to cite it at length: "Every proprietor of lands on the banks of a river, has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (*currere solebat*), without diminution or alteration. No proprietor has a right to use the water to the prejudice of other proprietors above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. '*Aqua currit et debet currere*' is the language of the law. Though he may use the water while it runs over his land, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors, he cannot divert or diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water

¹ See *Mason v. Hill*, 5 B. & Ad. 24.

back upon the proprietors above, without a grant or an uninterrupted enjoyment of twenty years, which is evidence of it. This is the clear and settled general doctrine on the subject, and all the difficulty that arises consists in the application.

The owner must so use and apply the water as to work no material injury or annoyance to his neighbor below him, who has an equal right to the subsequent use of the same water. Streams of water are intended for the use and comfort of man; and it would be unreasonable and contrary to the universal sense of mankind to debar every riparian proprietor from the application of the water to domestic, agricultural and manufacturing purposes, provided the use of it be made under the limitations which have been mentioned; and there will, no doubt, inevitably be, in the exercise of a perfect right to the use of the water, some evaporation and decrease of it, and some variation in the weight and velocity of the current. But *de minimis non curat lex*, and a right of action by the proprietor below, would not necessarily flow from such consequences, but would depend upon the nature and extent of the complaint or injury, and the manner of using the water. All that the law requires of a party by or over whose land a stream passes, is that he should use the water in a reasonable manner, and so as not to destroy or render useless, or materially diminish or affect the application of the water by the proprietors below on the stream. He must not shut the gates of his dams, and detain the water unreasonably, or let it off in unusual quantities to the annoyance of his neighbor.

Pothier lays down the law very strictly, that the owner of the upper stream must not raise the water by dam, so as to make it fall with more abundance and rapidity than it would naturally do, and injure the proprietor below. But this rule must not be construed literally, for that would be to deny all valuable use of the water to the riparian proprietors. It must be subjected to the qualifications which have been mentioned, otherwise, rivers and streams of water would become utterly useless either for manufacturing or agricultural purposes.

The just and equitable principle is given in the Roman law, "*Sic enim debere quem meliorem, agrum suum facere, ne vicini deteriore faciat.*"

In America, as may be inferred from this extract, and as it is stated in the judgment of the court of exchequer in *Wood v. Waud*, a very liberal use of the stream for the purposes of irrigation and for carrying on manufactures is permitted.

So in France where every one may use it "*en bon pere de famille, et pour son plus grand avantage.*"¹ He may make trenches to conduct the water to irrigate if he returns it with no other loss than that which irrigation caused. In the above cited case of *Wood v. Waud* it was observed that in England it is not clear that a user to that extent would be permitted, nor do we mean to lay down that it would in every case be deemed a lawful enjoyment of the water, if it was again returned into the river with no other diminution than that which was caused by the absorption and evaporation attendant on the irrigation of the lands of the adjoining proprietor. This must depend upon the circumstances of each case. On the one hand it could not be permitted that the owner of a tract of many thousand acres of porous soil, abutting on one part of the stream, could be permitted to irrigate them continually by canals and drains, and so cause a serious diminution of the quantity of water, though there was no other loss to the natural stream than that arising from the necessary absorption and evaporation of the water employed for that purpose; on the other hand, one's common sense would be shocked by supposing that a riparian owner could not dip a watering pot into the stream in order to water his garden, or allow his family or his cattle to drink it.

It is entirely a question of degree, and it is very difficult, indeed impossible, to define precisely the limits which separate the reasonable and permitted use of the stream from its wrongful application; but there is often no difficulty in deciding whether a particular case falls within the permitted limits or not, and in this, we think that as the irrigation took place not continuously, but only at intermittent periods, when the river was full, and no damage was done thereby to the working of the mill, and the diminution of the water was not perceptible to the eye, it was such a reasonable use of the water as not to be prohibited by law. If so it was no infringement of the plaintiff's right at all; it was only

¹ Code Civil, art. 640, note a., by Pailliet. See his *Manuel de Droit Francoais*, Paris, 1838.

the exercise of an equal right which the defendant's employer had to the usufruct of the stream.

We are, therefore, of opinion that there has been no injury in fact or law in this case, and consequently that the verdict for the defendant ought not to be disturbed.

The same law will be found to be applicable to the corresponding rights to air and light. These also are bestowed by Providence for the common benefit of man, and so long as the reasonable use by one man of this common property does not do actual and perceptible damage to the right of another to the similar use of it, no action will lie. A man cannot occupy a dwelling and consume fuel in it for domestic purposes without its, in some degree, impairing the natural purity of the air; he cannot erect a building or plant a tree near the house of another without, in some degree, diminishing the quantity of light he enjoys; but such small interruptions give no right of action; for they are necessary incidents to the common enjoyment by all.

SEC. 368. An unreasonable detention of water by a dam or otherwise, is an interference with the rights of lower owners. Thus, in *Sampson v. Haddinott*, 38 Eng. Law and Eq. 241, the defendant detained the water of a river that ran through his premises for the purpose of irrigating his meadow, and in so doing detained the water from the plaintiff until so late in the day that he could not use it as fully as he had a right to.

It appeared that in the irrigation of his land, the defendant proceeded according to the usual and proper methods adopted, and that the quantity of water that ultimately reached the plaintiff was not sensibly diminished in quantity, but by reason of the detention by the defendant it reached the plaintiff so late in the day as to be of comparatively little value. The court held that this detention of the water was a violation of the plaintiff's rights. The court, in delivering its judgment in the case, in discussing the relative rights of riparian owners, laid down this rule: "Every proprietor of land on the banks of a stream has a right to use the water, provided he so uses it as not to injure the rights of other owners above or below him on the stream. He may begin the exercise of this right at his will, but he cannot acquire a right

beyond his natural right by usage, against a proprietor above or below him on the stream, unless his use affects the power of such proprietors to use the stream, or some right therein, so as to raise the presumption of a grant, and thus render them servient tenements."

The rule is, that if the use of a stream by one riparian owner, essentially impairs the use below, it is unreasonable and unlawful, unless altogether indispensable to any beneficial use at every point of the stream.¹

The proprietor of land through which a stream flows, has a right to detain the water for his reasonable use, for mechanical and other purposes, and the question as to what is a reasonable use, is a question for the jury, and in determining the question of reasonableness they are not to regard what would be a reasonable use if there were no other mills on the stream, but are to regard the wants of *all* the mills, and say, from all the circumstances, whether the use is reasonable.² The question of reasonableness is essentially one of fact, and must necessarily depend upon the circumstances of each case. No definite rule can be given that is applicable to all cases. The detention, in order to avoid liability to others, must be excused by the circumstances of the case, taking into account the capacity of the stream, and the actual necessity or otherwise of the detention. In *Whalen v. Ahl*, 29 Penn. St. 98, the court say that, "where the owner of an upper mill *necessarily* detains water several days for the purpose of working his mill, he is not liable to a mill owner lower down the stream for damages which such detention occasions him.

In *Keeney & Wood Manufacturing Co. v. Union Manufacturing Co.*, 39 Conn. 576, the owners of an upper mill, whose business required the running of their mill only by day, detained the water of the stream during the night, such detention and the larger discharge during the day causing serious damage to the owners of a lower mill, whose business required the running of their mill both night and day. The lower privilege was occupied several years before the upper, and after the upper mill was built the water was for several years allowed to flow during the

¹ *Snow v. Parsons*, 28 Vt. 457.

² *Parker v. Hotchkiss*, 25 Conn. 321.

A detention of water that works no ma-

terial injury is no reason for regarding a mill as not lawfully existing. *Robertson v. Miller*, 40 Conn. 40.

night, and the lower mill had used it by night and by day. Upon a petition by the lower mill owners against the upper, for an injunction against the detention of the water by night, it was held — 1. That the petitioners had acquired no superior rights by their earlier occupation, or by their use of the water by night, so long as they had exercised no rights greater than such as belonged to them as riparian proprietors, the full flow of the stream being nothing beyond such right.

2. That all the petitioners were entitled to was a reasonable use of the stream against an unreasonable use or detention by the respondents; that the question was, whether the respondents had acted unreasonably in detaining the water, and that the burden of proof on this subject was on the petitioners.

SEC. 369. The right, in such a case, of the upper mill owner to make the stream useful to him by detaining the water during the night is of the same quality as the right of the lower mill owner to take the benefit of the constant flow. In deciding between these conflicting rights there are to be considered — 1. The custom of the country as to the running of mills. 2. The local custom, if there be one. 3. What general rule will best secure the entire stream to useful purposes. 4. Whether the detention of the water is necessarily an injury to the lower mill, and whether the apparent injury is not caused by the insufficiency of its own power.

The maxim, "*aqua currit et currere debet*," is applicable rather to the matter of a diversion of a stream and to the ordinary rights of riparian proprietors as such, than to the case of mill owners, who have a right to make a reasonable detention of the water by dams for the purposes of their mills.

The right to use water necessarily implies a right to dam and to detain it. One exercising this right can only *detain* it. He cannot divert it. He must not detain it unreasonably, or let it off in unreasonable quantities.¹

SEC. 370. In *Pollitt v. Long* recently heard at the general term

¹ *Twiss v. Baldwin*, 9 Conn. 291; *Allen (Mass.)*, 494; *Stein v. Burden*, 29 Merritt v. Brinkerhoff, 17 Johns. (N. Ala. 127; *Oregon Iron Co v. Terwilliger*, 8 Oregon, 1; *Foster v. Fowler*, 2 Conn. 366; *Springfield v. Harris*, 4 Thomson, 425.

of the Supreme court in New York, and reported in Vol. 3, Supreme Court Reports (Parson's edition), p. 232, the rights of a riparian owner to detain the waters of a stream for mill purposes were ably discussed by MULLIN, P. J.

This was an action to recover damages sustained by the plaintiffs by reason of the detention of the water of a stream by the defendants. It appeared that the plaintiffs and defendants were both riparian owners and had dams upon the same stream, and applied the water for the operation of machinery.

The defendant's dam was about nine feet high, and the water was collected in a pond covering about two and a half acres, and was used by him to operate a saw-mill by means of a *flutter* wheel. The defendant's mill was about one hundred and twenty feet above the plaintiff's factory. The defendant's mill required about three times the amount of water usually flowing in the stream for its operation, except when the volume thereof was increased by heavy rains and the melting of snow. The plaintiff's factory was operated by an over-shot wheel, and the water was conducted to it in a canal or flume from the dam, about ten feet below the defendant's mill. The pond created by the plaintiff's dam contained about one-fourth of an acre. If the stream had been permitted to flow uninterruptedly to the plaintiff's factory, there would have been water enough to operate it the entire year.

In times of low water it took from four to five hours to fill the defendant's pond, and this quantity would be exhausted in two or three hours. When the defendant's mill was not running, and while the defendant's pond was filling, the plaintiff's factory could not run, for the reason that no water could flow into the plaintiff's flume.

On each day, from the 15th to the 25th of October, 1866, the plaintiff's mill was stopped, and they were prevented from running and operating their machinery, by reason of the stoppage of the flow of water by the defendant, by the stoppage of the water to fill his pond.

It also appeared that the wheel used by the defendant required more water to operate it than any other kind in use.

It was shown by the defendant that, during the period aforesaid, his mill was run but a small part of the time, and that he

did not stop the flow of the water for any longer time, or in any different manner, than was rendered necessary for the accumulation of water in his pond with which to run his mill.

The judge at the circuit charged the jury that every riparian owner had a right to the reasonable use and enjoyment of a current of moving water, as it flows through or along his land, for mill purposes, having due regard to the like reasonable use of the water by proprietors above or below him.

That, in determining the question of such reasonable use, a just regard must be had to the form and magnitude of the current, its height and velocity; the state of improvements in the country in regard to mills and machinery, and the use of water as a propelling power; the general use of the country in similar cases, and all other circumstances bearing on the question of fitness or propriety in the use of the water in that case.

That, in determining the question of reasonable use of water by the defendant, the law requires that he should adapt himself to the kind of advanced machinery in common and general use in the country, and that if, under all the circumstances, the defendant's conduct has been reasonable and fair, the plaintiffs could not recover, even though their own mill has been stopped and they have sustained damage thereby.

The jury returned a verdict for the defendant, and the charge of the court was sustained at the general term.

SEC. 371. In determining the question of reasonableness in the detention and use of water as between mill owners, it is important first to ascertain by what title each holds, what rights each possess to the use of the water, and whether there is any valid and binding contract between the parties as to its use. When their legal *status*, in reference to the water, is ascertained it is then necessary to ascertain the capacity of the stream for mill purposes; the local custom as to the use of the water, if there be one, the kind of machinery used, and whether the injury is caused by the acts of the party complained of, or by an actual *insufficiency of the plaintiff's privilege*. As between themselves, each mill owner has a right to detain the water for the *reasonable* use of his mill, even though, by so doing, he entirely destroys the

value of a lower privilege. If there is not sufficient water from any cause to run all the mills upon the stream, the upper mills may reasonably apply the water, and if in such reasonable application of it they injure, or even destroy the lower privileges, it is "*damnum absque injuria*" as it arises, not from the acts of others, but from an actual insufficiency of the privilege itself. But the question of reasonableness is always a question for the jury.¹

SEC. 372. If there have been any restrictions imposed upon the use of water, by the grant under which a party holds, these restrictions are to be observed, as the party's rights are to be measured by the title under which he holds, as between him and his grantor, or others holding under title derived from the same source. But the right to complain of a violation of these restrictions is confined to the parties to the conveyance, or others upon the same privilege deriving title from a common source. Those above or below him on the stream cannot avail themselves of a violation of the conditions of the grant, but are limited to such a use of the water as violates their rights, and as in excess of the entire right of the whole privilege. There may be such conditions in the grant as restrict the use of the water to a particular purpose, as for the propulsion of a fulling mill, a carding mill, or any specific use. There may also be a division of the water. One owner upon the dam may be restricted to the use of the water during certain hours of the day, and another to its use during the intervening time, and the surplus of the power may be vested in still another, but these restrictions are only available as the basis of an action between owners upon the same privilege. A stranger to the title cannot complain of any excess of use that is not in excess of the entire rights of the privilege.¹

SEC. 373. As has previously been stated parties owning different privileges upon the same stream may, by their acts, impose restrictions upon each privilege, even where no express contract exists, but this is in cases where the parties have jointly done some act which is mutually beneficial to all the privileges in

¹ *Springfield v. Harris*, 4 Allen (Mass.), Oregon, 1; *Snow v. Parsons*, 28 Vt. 459; 494; *Oregon Iron Co. v. Terwilliger*, 3 Pollitt v. Long, *supra*.

excess of the natural uses of them, so that the law raises an implied contract between them, that the use of each shall be such as not to deprive the others of the benefits of the joint act. Thus in *Rock Manufacturing Co. v. Hough*, 39 Conn. 190, the petitioners and respondent being respectively the proprietors of mills and mill sites upon a stream, for the purpose of erecting a permanent dam across the stream, entered into an agreement by which each of the parties was to contribute a certain sum toward the expense of erecting the dam, which, it was agreed, should remain a permanent dam for their common use. A dam was erected, forming a large reservoir, the expense of which was borne by them, according to the terms of the agreement. The erection of the dam greatly enhanced the value of the mill sites and increased the capacity of the stream, in consequence of which the petitioners erected larger mills at great expense. During times of drouth, and during the dry season, the mills of the petitioners depended almost entirely upon the reservoir; and it was the custom of all the parties to draw water from the reservoir in sufficient quantity to run their mills only during the usual working hours, and to shut the gate during the night, and this was the only mode which could be adopted to prevent a waste of water in the dry season, and to use it to the best advantage to all interested. The respondent's mill, which had a large and deep pond, was situated on the stream above the mills of the petitioners, and they could get the water from the reservoir only by drawing enough from it to fill the respondent's pond and cause it to flow over his dam. During a very dry season all the mills depended on the reservoir, and water was drawn from the reservoir during the usual working hours in each day in the same manner as it had before been accustomed to be drawn during similar seasons. During that season the respondent's pond would be filled during the day, and kept filled by the water drawn from the reservoir for operating the mills, and would be full and the water running over his dam at night, when the gate at the reservoir was closed at the usual hour. After the gate was closed, the respondent was accustomed to run his mill during the night as long as the water in his pond furnished a sufficient head. The respondent's pond was thereby drawn down, and the petitioners were consequently

obliged to wait for water until it was filled again, to the serious injury of their business, and the water in the reservoir at last failed altogether in consequence of its waste by the respondent and the dryness of the season, until the petitioner's mills were compelled to remain idle. Held, that the intention of the parties to the contract was that they should all consult each other's interests, and use the water only during the usual working hours of each day, when all could use it to advantage, and that the use made of it by the respondent in the night time in the dry season was unreasonable, in violation of the real intent of the contract, and should be restrained by injunction.

SEC. 374. It may be given and regarded as a test in law that whenever the use of water by one proprietor is in excess of his natural right, and operates injuriously to another owner, or if it is continuous, though no actual damage results, the act is a nuisance, because it is actionable at any time during its exercise by any person affected thereby, as being in derogation of his rights, and if continued during the statutory period will create a servitude on the estate of every person affected thereby. This rule of course is to be construed in reference to the rights which one proprietor has acquired against another by prescription, and is applicable only to that condition of things that exists when each party stands on his natural right.¹

SEC. 375. As to the rights of riparian owners to use the waters of a stream for the purposes of irrigation, there is considerable conflict of doctrine, but it may be stated as a general proposition supported by the best considered cases, that the right of a riparian owner to divert the water of a stream for the purposes of irrigation, is subject to the restriction that he must not diminish the quantity of the water of the stream or unreasonably detain it, and, although there are some cases in which a different doctrine is advanced, they are cases which are entitled to no weight as authorities, and which are in conflict with the general common-law doctrine. The true rule in reference to irrigation is

¹ *Thomas v. Brackney*, 17 Barb. (N. Y. S. C.), 654; *Embrey v. Owen*, 6 Ex. 353; *Johns v. Stevens*, 3 Vt. 308; *Ripka v. Sergeant*, 7 Watts. & S. 9; *Wadsworth v. Tiltonson*, 15 Conn. 369; *Ennor v. Barwell*, 2 Giff. (Eng.) 410; *Wright v. Howard*, 1 Sm. & S. 190.

well stated in Washburn on Easements, p. 230, thus: "To limit a land owner to the mere benefit of having a stream flow through his land, without any right to divert the same or any part thereof, would be defeating in a great measure the purposes for which Providence has provided these sources of comfort and convenience to man, and the means of fertilizing the soil, and giving a profitable employment for industry and art. It is accordingly held that if in any question of diversion the jury should find that it was only of such water as the complaining party could not have used for any beneficial purpose, or that it was used in a reasonable manner, and for a proper purpose, an action for the same would not lie. But, as every diversion is *prima facie* a violation of the right of a riparian owner below, to have the benefit of the stream *ut currere solebat*, an action will lie therefor, unless the party using it can ground his defense upon such use as is above supposed."¹

SEC. 376. It is not a man's necessities nor his profits that furnishes the true measure of his right, but the real criterion is, how far he can go without an infringement upon the rights of others? He may go so far as he can in the use of water, keeping within his own right, but he goes beyond that at his peril. In *Van Hoesen v. Coventry et al.*, 10 Barb. (N. Y. S. C.) 518, this rule in reference to the rights of riparian owners, was laid down by the court. In that case the plaintiff was the owner of a woolen factory upon the Kinderhook creek, in the town of Stuyvesant. The defendants were the owners of mills upon the same stream, above the plaintiff's factory. There was an island in the creek, opposite the premises of both parties. The defendants' mills were near the upper end of the island, and the plaintiff's factory was near the lower end. Both were on the easterly branch of the creek. In the summer of 1846 it became necessary for the defendants to repair their dam and flume, and for that purpose

¹ Elliott v. Fitchburg R. R. Co., 11 Cush. (Mass.), 191; Howell v. McCoy, 3 Rawle. (Penn.), 236; Shreve v. Voorhees, 2 Green. Ch. (N. J.), 25; Williams v. Morland, 2 Barn. & Cres. 910; Thompson v. Crocker, 2 Pick. (Mass.), 59; Cooper v. Hall, 5 Ohio, 320; Parker v. Griswold, 17 Conn. 288; Embrey v. Owen, ante Sampson v. Haddinott,

ante; Webb v. Portland Manufacturing Co., 3 Sum. (C. C. U. S.), 189; Wright v. Howard, 1 Sim. & S. 190; Tyler v. Wilkinson, 4 Mason, 397; Wadsworth v. Tillotson, 15 Conn. 366; Pugh v. Wheeler, 5 Dev. & Bat. 50; Van Huesen v. Coventry, 10 Barb. (N. Y. S. C.), 508.

they shut down the head gates of their dam, the effect of which was to divert a portion of the water to the west branch of the creek, and away from the plaintiff's mill. In consequence of such diversion, the plaintiff was compelled to suspend business at his factory for several days.

For the injury thus sustained, this action was brought. The referee reported that, upon the evidence before him, the following, among other facts, were established: That in the ordinary flow of the stream, to shut down the head gates in the defendants' dam, diverted a portion of the water from the east to the west branch of the stream; that, while the head gates of the defendants' dam were closed, sufficient water was thrown into the west branch of the stream to affect injuriously the plaintiff's mill below, on the east branch; that the repairs made by the defendants were necessary, and could not be made without closing down the head gates, and that they were prosecuted with unusual vigilance in the number of hands employed, working early and late to complete them. The referee reported in favor of the defendants, and stated that he placed his decision mainly on the ground that, as matter of law, the defendants, for the enjoyment of their own property, had a right to close down the head gates of their dam temporarily, to make substantial and necessary repairs, doing no unnecessary damage. HARRIS, J., in delivering the opinion of the court, said: "The question presented by this case is, whether the owners of a mill have the right, when it becomes necessary for the purpose of making repairs, to *divert* the stream upon which it is situated, to the injury of another proprietor upon the same stream below. So far, at least, as my own researches have extended, the question has not been adjudged. Its decision must depend upon the general principles applicable to the subject. The general doctrine relating to water-courses is, that every proprietor is entitled to the use of the flow of the water, in its natural course, and to the momentum of its fall on his own land. The owner has no property in the water itself, but a simple usufruct. He may use it as it passes along, but he must send down to his neighbor below as much as he received from his neighbor above.' 'Though he may use the water

¹ Angell on Water Courses, § 90, 94; 3 Kent's Com. 439.

while it runs over his land,' says Kent, 'he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors he cannot divert or diminish the quantity of water which would otherwise descend to the proprietors below.' "

In *Blanchard v. Baker*, 8 Greenl. 253, 266, the doctrine is stated in the following clear and emphatic language: "It is an ancient and well-established principle, that water cannot be lawfully diverted, unless it is returned again to its accustomed channel before it passes the land of the proprietor below. Running water is not susceptible of an appropriation which will justify the diversion or unreasonable detention of it." "The owners of mills on a stream," says Justice STORY, in *Webb v. The Portland Manufacturing Co.*, 3 Sum. 189, "have an undoubted right to the flow of the water, as it has been accustomed of right and naturally to flow to their respective mills. The proprietor above has no right to *divert* or *unreasonably retard* this natural flow to the mills below." Page 200: "No proprietor can diminish the quantity of water which would otherwise descend to the proprietors below," says the vice-chancellor, in *Wright v. Howard*, 1 Sim. & S. 190, 203. Lord ELLENBOROUGH, in *Bealy v. Shaw*, 6 East, 208, 214, says: "The general rule of law is, that every man has a right to have the advantage of a flow of water on his own land without diminution or alteration." Chief Justice GIBSON, in *McCalmont v. Whittaker*, 3 Serg. & Rawle (Penn.), 84, 90, says: "The water power to which a riparian owner is entitled consists of the fall of the stream when in its natural state, as it passes through his land, or along the boundary of it, or, in other words, it consists of the difference of level between the surface where the stream first touches his land, and the surface where it leaves it."

It is also laid down as the law of Scotland, that "although a proprietor may use the water while within his own premises, yet he must allow it to pass on to the inferior heritors."¹ Other authorities to the same effect might be cited, but these are suffi-

¹ Bell's Law of Scotland, 691, cited by Angell in his Treatise on Water-courses (4th ed.), § 95, note. See, also, *Gardner v. Village of Newburgh*, 2 Johns. Ch. 162.

cient to show how clearly the general doctrine on the subject is settled, and how uniformly it has been recognized. The proprietor above has a right to apply the water to his own use, but the proprietor below has an equal right to its subsequent use. Each must so use it as not to work any material injury or annoyance to his neighbor.

The right to use, necessarily implies the right to dam and to detain the water long enough to use it to advantage.

"The maxim, '*Sic utere tuo, ut alienum non lædas*,' says THOMPSON, Ch. J., in *Platt v. Johnson*, 15 Johns. 213, 218, "must be taken and construed with an eye to the natural rights of all." But, while each proprietor has a right to detain the water as it passes through his land long enough for the proper and profitable enjoyment of it, he can only *detain* it. He can not lawfully *divert* it. Chancellor KENT states the rule on this subject as follows: "All that the law requires of the party by or over whose land a stream passes, is that he should use the water in a reasonable manner, and so as not to destroy or render useless, or materially diminish or affect the application of the water by the proprietors above or below on the stream. He must not shut the gates of his dams and detain the water unreasonably, or let it off in unusual quantities to the annoyance of his neighbor." Judge STORY, in noticing the rule as thus laid down by Kent, says: "I scarcely know where else the doctrine can be found reduced to so elegant and satisfactory a formula."

The application of this rule to the case under consideration, can not, it seems to me, justify the defendants, even for the temporary purpose of repairs, in diverting the water from the plaintiff's mill.

If such diversion had been absolutely necessary, as the referee seems to think, although I am not quite sure that the testimony warranted that conclusion, I think it should be regarded as a defect in the defendants' water-power, the consequences of which should fall upon them, and not upon the plaintiff.

The question in every such case seems to be, according to all the authorities, whether the water has been *diverted* or *unreason*

¹ 3 Kent's Com. 440, 441.

² See *Webb v. The Portland Manufacturing Co.*, above cited, p. 199.

ably detained. If there has been a diversion accompanied with injury, the action is sustained. If there has been merely a detention, then the further question arises, whether such detention was reasonable. But whether or not a diversion of water is reasonable, is a question not so much as mentioned by any writer or judge.

The very proposition assumes the right of the proprietor above to use the water for his own purposes, to the exclusion of the proprietor below — a proposition inconsistent with the doctrine universally admitted, as we have seen, that all the proprietors have the same rights.

My conclusion, therefore, is, that if the defendants' water-power is so situated, in reference to the two branches of the stream, that they are unable to make repairs to their dam and flume without diverting the water from one branch to the other, and thus entirely depriving the plaintiff of the use of the water so diverted, they must obtain the plaintiff's consent to make such diversion, or answer to him in damages for the injury he sustains.

The same rule applies to the use of water for the purposes of irrigation. There is no right in a tiller of the soil superior to the rights of a manufacturer. Either may make a reasonable use of the water, but for all uses beyond that they are held to a strict liability, and all cases that hold to the contrary, are mere excrescencies upon the common law, and are entitled to no weight as authorities.

CHAPTER TENTH.

SURFACE WATER.

- SEC. 378. No right in water that squanders itself.
 379. Control over surface water.
 380. Rule in *Bowlesby v. Speer*.
 381. Rule in *Broadbent v. Ramsbotham*.
 382. Swamps, and wet, spongy places.
 383. Rule in *Rawstron v. Taylor*.
 384. Rule in *Waffle v. R. R. Co.*
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 386. Rule in *Popplewell v. Hodgkinson*.
 387. Servitude upon lower estates.
 388. Servitude only extends to water arising from natural causes.
 389. Comments on *Swett v. Cutts*.
 390. *Martin v. Riddle*.
 391. *Beard v. Murphy*.
 392. *Hays v. Hinkleman*.
 393. Right to divert surface water.
 394. Distinction between rule in cities, and country places.
 395. *Earle v. De Hart*.
 396. *Gilham v. R. R. Co.*
 397. *Ogburn v. Connor*.
 398. Servitude between higher and lower estates.
 399. Exists only in favor of water from natural causes.
 400. Conflict of doctrine.

SEC. 377. No prescriptive right can be acquired in water that squanders itself over the surface of the ground, even though in the natural and ordinary course of things it would flow upon the land of another. And this is so, even if it flows thus during a considerable time each season, where it acquires no definite channel, and is subject to the ever varying fluctuations of the season, and arises from the fall of rain or the melting of snow. In all such cases the land owner may divert it, and raise barriers on his land, to send it in any direction on his own land, or in any direction that he chooses, so as not to produce injury to another.¹

But where a natural stream of water, that is not the product of spasmodic causes, runs in a definite channel for a distance so as to acquire the character and legal attributes of a water-course,

¹ *Ashley v. Walcott*, 11 Cush. (Mass.) 192; *Goodale v. Tuttle*, 29 N. Y. 459.

suddenly departs from all limits and spreads itself over a wide tract, in consequence of the peculiar formation of the ground, and after passing thus for a distance assumes a definite channel again, this is such a water-course as gives to all persons below, the right to have the water go to them in the usual and ordinary mode, and every diversion of it so as to prevent its reaching the channel below, or so as to diminish the quantity of water that would naturally go there, is an interference with the rights of the lower owners, and an actionable nuisance.¹

SEC. 378. While every person may, on his own land, turn the surface water, or the water which squanders itself there, and cause its escape in a manner different from which it would naturally go, yet he may not do this to turn it upon another's land, or so that it will escape upon the land of another in a direction or channel different from that in which it would naturally escape. He is not liable for any consequence of the escape of surface water from his land in its ordinary and natural course, but he may not change the course of its natural escape by means of an embankment or otherwise; if he does, he is liable for all the damages that ensue. Every such act is the invasion of another's right, and is actionable because of the injury to the right, whether the damage be great or small. Indeed, the act is wrongful *per se*, and in its inception, and is actionable without any special damage.²

SEC. 379. In *Bowlsby v. Speer*, 2 Vroom N. J. 351, it was held that, where one, by the erection of a *building* upon his premises, diverted the surface water, and thus caused it to flow upon the land of an adjoining owner, no liability therefor exists. One land-owner is under no obligation to discharge the water that falls upon his premises in a particular manner. He may divert it and withhold it entirely from one over whose land it would naturally pass, and that, too, even though it has passed there for many years, and supplies the water of a water-course, by which a lower owner has run his mill, and upon which he depends for

¹ *Macomber v. Godfrey*, 108 Mass. 219; *American Rep.* 349; *Gillett v. Johnson*, 30 Conn. 80. *American Rep.* 732; *Dawson v. Paver* 5 Ha. 415; *Smith v. Kenrick*, 7 C. B. 515; *Bowlsby v. Speer*, 2 Vroom. (N. J.) 351.

² *Tootle v. Clifton*, 22 Ohio St. 247; 10

that purpose. Where, however, the water assumes a definite channel, it cannot then be diverted, but it may be prevented from reaching this channel, and be discharged in any direction the land-owner sees fit to send it, so that he does no damage to another. By the civil law, lower lands were charged with the servitude of discharging the water from higher lands, but there is no servitude existing in favor of lower estates against the higher ones, compelling the discharge of the water over the lower estate.¹

SEC. 380. In *Broadbent v. Ramsbotham*, 11 Exchequer, 602, this question was very ably discussed and disposed of. In that case, it appeared that the plaintiff was the owner and occupier of a mill which had existed for fifty years, and was situated upon a natural stream called Longwood brook, the waters of which had, during all that time, been used by the occupiers of the mill for working the mill by water power, and carrying on in it the business of a manufacturer of woolen cloths.

The brook flowed along the bottom of a valley, which was bounded by a range of hills on the north or north-west side and by another range of hills, called Nettleton hill, on the south or south-east. This last range of hill ended with a deep slope close to the north-west side of the two reservoirs of the water-works. This slope was much broken by land-slips, more particularly on the north and east sides of it. Two of these land-slips, which were below the highest level of the hill, were known by the names of Pendle hill and Pighill wood.

The defendant Atkinson was the occupier of a farm in the township, called Petty Royds' farm, on the north-west side of the range called Nettleton hill. The defendant, Dr. Ramsbotham, was the receiver and manager of that estate for the owner, who was an infant.

The natural state of the surface of Petty Royds' farm was very uneven, and needed much draining. Parts of it had been partially, but imperfectly, drained by the tenants, before making

¹ *Swett v. Cutts*, 50 N. H. 439; 9 Am. Rep. 276; *Cyrus v. Ayrault*, 47 N. Y. 43; *Buffam v. Harris*, 5 R. I. 253; *Ennor v. Barwell*, 2 Giff. 410, as to water arising from springs near another's land, and finding its way there though in no defined channel. But see *Pixley v. Clark*, 35 N. Y. 532.

the drain which led to the present action. In some of the closes, lodgments of water and boggy places had existed, and horses, when crossing over the close called Long bottom, had sunk in.

From the sides of the hills called Pighill wood and Pendle hill, which lie to the west of Petty Royds' farm buildings, the natural flow of water is northwards until it reached the brook; and all water passing over the lands which lie on the west side of the farm buildings naturally flowed northward into that brook. Above Pighill wood was an area of about six acres and a half, which was formed into a shallow basin by the land-slips which had occurred on the face of this hill, and the waters collected in this basin, if they ever exceeded the depth of about three feet above the surface of the lowest point of the basin, would escape down the north-east corner and then northward to the brook, on the west of the Petty Royds farm buildings. All the water, which did not exceed the depth of three feet, passed away into the ground. If the waters which so escaped in excess of the above amount were very abundant at one time, a part could then find a passage to the east of their point of escape, and run down the field called the Long bottom.

Near the north-east corner of this basin there was an elevated portion of land, on part of which the farm buildings stood projecting from the hill-side, and which advanced to the north from the general slope of the hill above these farm buildings.

This elevated portion of land divided the natural flow of water on the west of the buildings from the natural flow of water on the east of them, which was to the eastward down Long bottom close, and under some steep land-slips called Duck holes and Elmhurst wood.

On the west side of the farm buildings there formerly existed a well of water seventy yards from the farm house. This well was supplied by a subterraneous flow of water out of the ground, and from it the farm house was supplied with water. In seasons of a great supply of water there was an overflow from this well, which ran northward to the brook. The water of this well the former occupants of the farm and of the neighboring cottages used for domestic purposes, as spring water.

Adjoining the south side of this well was a swamp, extending

over an area of about sixteen perches, occasioned by a slight elevation of the surface toward the north, which obstructed the escape of any water which had once found its way there. This swamp communicated with the water of the well, and was never entirely free from water at any season of the year. The supply of water to the farm house, for the use of the tenant and his family and servants, was wholly dependent on this well, which, at no season, was ever dry, although its level lowered in dry weather. At a distance of about sixteen yards to the south of this well, on the other side of the swamp, and more under the slope called Pendle hill, were also formerly two wells, called the horse-wells.

At the upper end of the close called Long bottom, where it adjoined the farm yard and buildings of Petty Royds, there formerly existed a well, which was distant fifty-six yards and two feet toward the east, from the door of the farm house. This well, which was two feet deep below the surface of the ground, and about three feet square, was supplied from the water which arose out of the ground on the hill side near that spot.

This well was used as the watering-place for the cattle of the farm, and the supply from it in dry seasons being greatly reduced in quantity, the cattle had then to go on their knees to get it. With the overflow of this well commenced a stream of water, which, for part of its course, ran in an open ditch down the hedge-side on the south of Long bottom close, and in other parts down a small channel worked by the water, and over swampy places where the cattle had trodden in the soil.

After this stream of water left Long bottom close, it ran directly eastward over the close called Lower Woods, from thence along a natural valley in an easterly direction, and through the fence which divided the close called Lower Woods from the close called Top Field. From this fence it passed to the north-east, across the north-west corner of Top Field, and leaving that close it went eastward down by the hedge sides, and passing the houses at Leys it discharged itself, before and up to the construction of the Mill-owners' Compensation Reservoir into the Longwood brook, and since the first construction of that reservoir it discharged itself into the Mill-owners' Compensation Reservoir in Longwood.

When a sudden flood of rain was discharged into the course above described, the water of this stream overflowed its channel at the point where it passed through the fence on the east side of Lower Woods and entered the close called Top Field, and the water so overflowing escaped partly over that and other closes, and entered the Mill-owners' Compensation Reservoir at its most southern angle or point.

Some time previous to 1851 the defendant Atkinson had partially drained portions of Long bottom, and in that year he applied to Dr. Ramsbotham to have a main cut for the purpose of carrying off the water from the upper portion of that close and improving this part of the farm. Dr. Ramsbotham gave Atkinson authority to make the drain.

Atkinson began the drain in August, 1852. The drain was commenced at the point in the course of the stream above described, where it passed out of Lower Woods through the fence into Top Field, and followed that course upward through Lower Woods in the natural valley, and passed under Elmhurst Wood into Long bottom, taking the same direction as that of the stream under the hedge side for quite a distance in that close, and then passed under that hedge into the close called Duck Holes. In Duck Holes it ran parallel to and along the side of this same hedge, and generally in the direction of the stream until it reached the point where the well on the east of the farm buildings formerly existed at the top of Long bottom. Three stone watering troughs were fixed near the place of the well, and that well had been levelled and filled up. Atkinson afterward cut the drain in a western direction and made it pass on the south side of the farm buildings by carrying it through the elevated ground, before described, on which these buildings stood, and passing thence under the slopes on the west side of the farm buildings, which were called Pighill Wood. It reached a point in its course which was eighty-eight yards to the west of the barn end of the farm buildings.

Atkinson's object in continuing the drain to the west of the stone watering places was to carry water from the west side of the farm buildings, for the supply of those watering places on the east of them, and was not intended by him for agricultural purposes

The drain from the spot occupied by the stone watering places, east of Petty Royd's farm yard, down Duck Holes and Long bottom, and through Lower Woods, was a good and useful agricultural drain for the purpose of relieving the ground and subsoil of those closes of lodgments of water and swamps, which in parts extended to a great depth, as it would serve as a master drain into which collateral drains could find an outlet for more completely draining those parts of the farm of Petty Royd's.

The effect produced by the part of the drain which was carried from the stone troughs to the west through the elevated ground upon the natural flow of the streams of water which escaped to the northward into Longwood brook from the well on the west side of the farm house, was to divert the water of the streams, and to intercept the water which before ran into and underground there, near this well, and was there discharged northward, and to carry those waters away down to the east by the south side of the farm house. The surface of the swamp near the well on the west side of the farm buildings, as it existed before the cutting of the drain, had been filled in and raised, and the well itself had been filled up and levelled, and did not exist.

The effect of the drain east of the farm buildings and of the said conduit leading from it to the new stone reservoir, was to carry off the water which, before the drain was cut, ran down the course of the stream through Long bottom, and to discharge part of it into that reservoir and part of it down to Leys and to the Mill-owners' Compensation Reservoir.

The judgment of the court was delivered by ALDERSON, B., who said: "The question is whether the defendant Atkinson has improperly diverted, by the acts which he has undoubtedly done, four sources which have, as the plaintiff contends, supplied the Longwood brook, on which his mill is situated. There is no doubt that in the course of the drainage these sources of water have been diverted, and now fall into the drain made by the defendant." The arbitrator describes them thus: "And first, as to the six and a half acre pond," he says, "from the sides of the hill the natural flow of water is northward till it reaches Longwood Brook, and all water passing over the lands there, naturally runs down toward, and into Longwood Brook."

"About Pighill Wood a shallow basin is formed by the land slips which have from time to time occurred, and the water collected in it, if it exceeds the depth of about three feet above the lowest point of the basin, escapes northward and runs down over the surface of the hill toward Longwood brook. The rest sinks into the ground or remains as a pond in the hollow thus naturally created by the form of the land." Now, we think that this water, both that which overflows and that which sinks in, belongs absolutely to the defendant on whose land it rises, and is not affected by any right of the plaintiff. The right to the natural flow of the water in Longwood brook undoubtedly belongs to the plaintiff; but we think that this right cannot extend further than a right to the flow in the brook itself, and to the water flowing in some defined natural channel, either subterranean or on the surface, communicating directly with the brook itself. No doubt all the water falling from heaven and shed upon the surface of a hill, at the foot of which a brook runs, must by the natural force of gravity, find its way to the bottom and so into the brook; but this does not prevent the owner of the land on which this water falls from dealing with it as he may please and appropriating it. He cannot, it is true, do so if the water has arrived at, and is flowing in some natural channel already formed. But he has a perfect right to appropriate it before it arrives at such a channel. In this case a basin is formed in his land which belongs to him, and the water from the heavens lodges there. There is here no water-course at all.

If this water exceeds a certain depth it escapes at the lowest point, and squanders itself (so to speak) over the adjoining surface. The owner of the soil has clearly a right to drain this shallow pond and get rid of the inconvenience at his own pleasure. We have no doubt, therefore, that as to this source of feeding the Longwood brook the plaintiff has no title. The same may be said of the swamp of sixteen perches, which is merely like a sponge fixed (so to speak) on the side of the hill, and full of water. If this overflows it creates a sort of marshy margin adjoining; and there is apparently no course of water either into or out of it on the surface of the land. As to the subterranean courses communicating with this swamp, which must no doubt exist, it is

sufficient to say that they are not traceable so as to show that the water passing along them ever reaches Longwood brook. This falls, therefore, into the same category, or rather is a stronger instance of the rule before mentioned. The well at this point is also in *simili casu*. It is not found in the case that it has any subterranean communication with Longwood brook. Indeed, if it had any such communication (inasmuch as the brook seems far below the bottom of this shallow well), the communication would probably draw off all the water in it. It is sufficient, however, to say that it is not found so to communicate. But no doubt when this well overflows the overflow pours itself over and down the declivity toward the brook. But this gives no right to the water, as we have already shown in the case of the six and a half acre pond. These are the three grounds of the plaintiff's complaint in the first count of his declaration. They all seem to us to fail.

The stream said to be diverted is one in which, on the side of a hill, a stream wells out from the ground at a depth of about two feet and is received into a basin of about three feet square, and used as a watering place for cattle. This stream in dry seasons was somewhat scanty, so as to compel the cattle at those periods to go down on their knees to reach it. At other times it overflowed its basin, and then it ran down part of the way in an open, and as we presume, artificial ditch, for it is described as a ditch beside a hedge. The water, lower in its course, flows on in a small channel worked by the water and over swampy places where the cattle had trodden in the soil. Still lower down, after passing through one or two fields, it arrives in what is described as a natural valley, and after this it would have probably communicated with Longwood brook but for its diversion into the Mill-owners' Compensation Reservoir, which is in fact the same thing.

There is here also, we think, nothing found to take the water from this well out of the same class as the three former cases. *We must consider the stream in its beginning, not after it has arrived in the natural valley communicating with the reservoir.* If the water, after having arrived there, had been diverted, the case would be different.

The water falling from heaven on the side of a hill, we have before said, may be appropriated, though not after it has once arrived at a defined natural water-course; and here the question is whether this water in its first origin, and before it has arrived at any definite natural watercourse conveying it onwards toward Longwood brook, has not been intercepted by the defendant's drain, and so appropriated by him; and we think it has. For what are the facts?

The water in dispute is only the overflow of a well, and the well is now prevented from overflowing.

But when before it did overflow, it run into a ditch (the lowest adjoining ground) made artificially, and for a different purpose, running beside a hedge. This was no natural defined watercourse. After this it squandered itself over a swamp made by the feet of cattle treading about, and it is not till long after this that what still remained of it found its way into what may there perhaps be correctly called a definite natural watercourse, receiving this and probably other water from other sources also. This part of the case, we think, is wholly undistinguishable from and is governed by the decision of this court in the late case of *Rawston v. Taylor*, *infra*, § 382.

This complaint, therefore, fails also. The result is (without going into any question as to this being done by the defendant Atkinson in the rightful exercise of his power of draining his own lands; which probably the pleadings do not raise) that the plaintiff has failed to establish any right to the natural flow of these four streams of water, or any of them, and that on this part of the case our judgment must be for the defendants.

SEC. 380. When, however, even surface water having no definite source, as for instance being supplied from the falling of rain and the melting of snow upon the mountain sides, assumes a definite channel and escapes through that channel during a considerable portion of the year, so that it may fairly be said to possess the attributes of a water-course, the water cannot be diverted from the channel itself, but may be prevented from reaching the channel by being turned in any direction the owner of the land sees fit to send it.

But when it has reached the definite channel it becomes a water-course, and however small the quantity of water escaping through it, it cannot then be turned away from it.¹

SEC. 381. Where water lies upon the surface of the ground in wet, swampy places, and extends even over the lands of several proprietors, but has not taken to itself the qualities of a stream so as to become a water-course, any owner of such lands may, by drains or other artificial means, exhaust the water and redeem his land from its swampy condition.²

The owner of land has an unrestricted right to drain it for agricultural purposes when the water which it is sought to get rid of is mere surface water, and has no definite source or channel, and even though a lower proprietor is thereby deprived of water which had previously been accustomed to come to him, he has no cause of action for the diversion.³ Neither does the fact that the land drained is wet and springy, so that in most seasons the water rises to the surface and flows off upon the land of another, thus supplying him with water for domestic or manufacturing purposes, make any change in the right or liability of the owner of the upper estate, if the water assumes no definite channel, but spreads itself over the surface of the soil, and squanders itself there.⁴

SEC. 382. In *Rawstron v. Taylor*, this question was raised, and what seems to be the generally recognized rule in such cases was announced. It appeared that the land of the plaintiff and defendant was contiguous, and on the outside of the defendant's land, and near to it, was a wet, springy spot, where, at most seasons of the year some water rose to the surface, and collected in sufficient quantity to flow down the slope of the land. In wet times a great body of water flowed down the slope, and in dry times,

¹ Washburn on Easements, p. 464; *Bangor v. Lansil*, 51 Me. 525; *Park v. Newburyport*, 10 Gray (Mass.), 28; *Duddon v. Guardians*, 1 H. & N. 627; *Luther v. Winnisimmet*, 9 Cush. (Mass.) 171; *Ennor v. Barwell*, 2 Giff. 410.

² *Cyrus v. Ayrault*, 47 N. Y. 73; *Swett v. Cutts*, 50 N. H. 439; *Buffum v. Harris*, 5 R. S. 253.

³ *Waffle v. N. Y. Central R. R.*, 58 Barb. (N. Y. S. C.) 413; *Cott v. Lewiston*, 36 N. Y. 217; *Swett v. Cutts*, 50 N. H. 439; *Papplewell v. Hodgkinson*, 20 L. T. (N. S.) 574; *Goodale v. Tuttle*, 29 N. Y. 439.

⁴ *Rawstron v. Taylor*, 11 Exchq. 367; *Swett v. Cutts*, ante.

very little, and sometimes none, flowed there. There was no regularly formed ditch or channel for the water, the place where it flowed being constantly trodden in by cattle. The water which was not absorbed (and, except in times of drought, all of it was not absorbed), ran into an old water-course of the plaintiff, and thence into the plaintiff's reservoir. The water had flowed in this manner for more than twenty years. The defendant, for the purpose of draining his land for agricultural purposes, and also for the purpose of supplying a part of his estate with water for domestic purposes, diverted the water from the plaintiff's water-course.

At another point on the defendant's land, for a period as long as any one could remember, the water had risen to the surface, and drinking places had been established with stones, for cattle, and the water went down a ditch into the plaintiff's water-course and reservoir.

It also appeared that, for more than twenty years, water had flowed through an old drain on the defendant's land, and along an ancient water-course, and from thence along other lands of the defendant which, for convenience sake, we will designate as "B," and so contributed to the motive power for the operation of the plaintiff's mill. In 1845 the defendant sold the land "B" to the plaintiff, "together with all ways, water-courses, liberties, privileges, rights, members and appurtenances thereto appertaining or belonging," subject, however, to the proviso that it should be lawful for the defendant to use, for any manufacturing, domestic, or agricultural purpose, any water flowing from or through the contiguous lands of the defendant unto or into the close "B," *returning* the surplus into its usual channel, so that the water should not be diverted from its then course, but should be allowed to run into the close "B." The defendant, after the execution of this deed, erected a lock-up tank upon his land, and caused the water which arose there, near the close "B," to be conveyed from the tank to the lower part of his land to be used by his tenants for domestic purposes, so that the surplus could not be returned to the close "B." There were five counts in the plaintiff's declaration. There was a verdict for the plaintiff on all the counts in the declaration, the first and second of which

charged the diversion and interference with the water first named, and the third of which charged the diversion by means of the tank and contrary to the provisions of the defendant's deed. I append the opinion of PARKER, B., in full, as it embodies the law controlling this class of uses of water, in much more appropriate and comprehensive language than it could be stated by me. He said:

"With respect to the first question as to the interference of the defendant with the water at the swamp, I am of opinion that the defendant is entitled to have the verdict entered for him. This is the case of common surface water rising out of springy or boggy ground, and flowing in no definite channel, although contributing to the supply of the plaintiff's mill.

"This water having no defined course, and its supply being merely casual, the defendant is entitled to get rid of it in any way he pleases."

The same observations apply to the water rising at the point K. This water has no defined course, and the supply is not constant, therefore the plaintiff is not entitled to it. The case of *Dickinson v. Grand Junction Canal Company* does not apply, and the defendant is entitled to get rid of this also for the purpose of cultivating his land in any way he pleases. With respect to the last and most important point, which relates to the interference with the flow of the water to the Lower Gin bank, we must look to the deed, for the plaintiff's rights to that water depend solely upon the deed. By that instrument the defendant conveys to the plaintiff the Gin bank, "together with all ways, waters, water-courses, liberties, privileges, rights, members and appurtenances to the same close and piece of land belonging or appertaining."

Now, this right to this water would not pass independently of the deed, as the plaintiff would have no right to water in *alieno solo*. Natural watercourses are like ways of necessity. The right to have a stream running in its natural direction does not depend on a supposed grant, but is *jure naturæ*.¹ But if the stream is artificial, no such right exists. This is not a natural watercourse;

¹ *Ennor v. Barwell*, 2 Giff. 410; *Tyler* (N. Y.) 162; *Davis v. Fuller*, 12 Vt. v. *Wilkinson*, 4 Mason (N. S.) 397; 178; *Corning v. Troy*, 39 Barb. (N. Y.) *Williams v. Morland*, 2 B. & C. 910; 311; *Brown v. Bowen*, 30 N. Y. 538; *Gardner v. Newburgh*, 2 Johns. Ch. *Wadsworth v. Tillatson*, 15 Conn. 366.

but the plaintiff is entitled to the flow of this water, under the conveyance which gives it to him, by the terms of the grant. It is unnecessary to try whether this right passed under the proviso, which however throws light upon the grant, and shows that this water was intended to be conveyed. The proviso is for the benefit of the defendant, and gives him the right to apply any water flowing through his land for certain specified purposes; but when he has taken such water, he is bound to return the surplus into its usual channel in the watercourse at a certain place.

The defendant has no right to make any permanent diversion of the water. He may take away the water in buckets, or by any other mode of conveyance, for domestic, agricultural or manufacturing purposes; but when he has taken what he wants, he is bound to return the surplus into its usual channel at the place mentioned in the plan for the use of the plaintiff, and he cannot divert the water. It seems to me clear on looking at the proviso, what the defendant grants to the plaintiff by the conveyance, and the defendant is not entitled to more than what is reserved to him by the proviso. He has permanently diverted the water by placing it under lock and key, and by so doing has deprived the plaintiff of the use of it.

I am, therefore, of the opinion that the verdict ought to be entered for the defendant as to the two first causes of action; and as to the third, the verdict entered for the plaintiff should stand.

SEC. 383. In *Waffle v. N. Y. Central R. R. Co.*, 58 Barb. (N. Y. S. C.) 421, the question as to the right of parties to deal with surface water arising upon their premises, when its diversion affected the value of mill property in part dependant upon such water for its motive power, was very ably discussed and disposed of by JOHNSON, J.

In that case the defendants, in the construction of their railroad, at a distance of about two miles from the plaintiff's mill, for the protection of their road-bed, dug two ditches or trenches, one on either side of their road, to protect the embankment.

The plaintiff had a mill and mill-pond on a stream formed, in the main, I should judge from the statement of the case by the court, from the surface waters arising from the low boggy lands

in the vicinity. The effect of the construction of the defendant's road, and the ditches referred to, was to prevent the water from going to the plaintiff's mill in its usual volume in dry seasons, and caused it to be discharged there in such volumes in times of high water, that the plaintiff could not use it for the operation of his mill, but was compelled to throw open his flood-gates and allow it to run to waste. The case was ably argued for the plaintiff, and the court say :

“ There is no dispute about the facts in this case. The plaintiff's saw-mill is upon a small stream, nearly two miles below the point where the defendant's road crosses such stream. At that point the land is naturally low and marshy, and the defendants, in constructing their road, raised the bed thereof above the natural surface of the land, by excavations on each side, which made ditches, by means of which the surface water of this low, marshy land was, for a considerable distance, drawn off and passed into this stream on each side of the road-bed, where the stream is crossed by the road. These ditches are wholly upon the defendants' land, and conduct the surface water into this stream upon their own land. The only cause of action stated in the complaint is, in substance, that, by means of these ditches, the water from this low land is drawn off and conveyed into this stream more rapidly than it would be otherwise ; and in the wet season, and in times of flood and high water, filled the stream and the plaintiff's pond so full, and increased the volume of water to such an extent, that he could not use the same, but was compelled to open his gates and let the water flow without using the same ; and that, as the dry season came on, the water was, by the same means, drawn off so rapidly from these low, wet grounds, that the stream did not keep up as it did before, and the supply which said stream was accustomed to receive gradually from such wet lands was earlier exhausted, and the plaintiff's mill thereby was compelled to lie idle and unemployed for want of water for a much longer period than formerly, and a much longer period than it would, had these drains not been made. The testimony tended to sustain these allegations in the complaint. It appeared from the evidence that there was no natural outlet or water-course from this low wet land into the creek,

but a gentle and gradual inclination of the surface for a long distance toward the stream. The defendant's ditches extended through these lands for a distance of over two miles, and it appears that the owners of the lands along this distance, adjacent to the railway, have availed themselves of the defendant's ditches, and drained the surface water from their lands, by means of ditches through the same, emptying into the defendant's ditches.

By these means the surface water is discharged from these wet lands, and the same are rendered tillable and productive, instead of remaining waste lands, and serving as a mere reservoir to hold water for the use of the plaintiff's mill, for a few more days or weeks each summer.

It is entirely clear that these facts constitute no cause of action. Every person has the unquestionable right to drain the surface water from his own land, to render it more wholesome, useful or productive, or even to gratify his taste or will, and if another is inconvenienced or incidentally injured thereby he cannot complain. No one can divert a natural water-course and stream through his land to the injury of another with impunity, nor can he, by means of drains or ditches, throw the surface water from his own land upon the land of another to the injury of such other. But where a person can drain his own land without turning the water upon the land of another, or where it can be done by drains emptying into a natural stream and water-course, there can be no doubt of his right thus to drain, even though the effect may be to increase the volume of water unusually at one season of the year or to diminish the supply at another.

No one can be required to suffer his land to be used as a reservoir or water table for the convenience or advantage of others. This principle is laid down by all the judges in *Rawstron v. Taylor*, 11 Exch. 369. It is also recognized as the true rule by DENIO, Ch. J., in *Goodale v. Tuttle*, 29 N. Y. 459, at page 467, where he says: "In respect to the running off of surface water caused by rain or snow, I know of no principle which will prevent the owner of land from filling up the wet and marshy places on his own soil, for its amelioration and his own advantage, because his neighbor's land is so situated as to be incommoded

by it. Such a doctrine would militate against the well-settled rule that the owner of land has full dominion over the whole space above and below the surface." In *Miller v. Larbach*, 47 Penn. 154, THOMPSON, J., in delivering the opinion of the court, says: "No doubt the owner of land through which a stream flows may increase the volume of water by draining into it, without any liability to damages by a lower owner. He must abide the contingency of increase or diminution of the flow in the channel of the stream, because the upper owner has the right to all the advantages of drainage or irrigation, reasonably used, which the stream may give him."

This rule commends itself to general acceptance by its sound sense, and easy adaptability to the common wants, interests and necessities of adjacent owners of lands. See also *Kauffman v. Greisemer*, 26 Penn. 407; *Martin v. Riddle*, id. 415, note; *Williams v. Gale*, 3 H. & J. 231; Angell on Water-courses (6th ed.), §§ 108a to 108s), where the whole doctrine of drainage is examined and treated."

SEC. 384. A novel question arose in the case of *Waffle v. Porter*, 61 Barb. (N. Y. S. C.), 130.

In that case the question as to the right of the owner of land to improve a spring upon his own premises for his own use and convenience arose. It seemed that the defendant was the owner of land adjoining the plaintiff's, and that he dug out and tubed a spring thereon for his own use and convenience. The spring overflowed and the water therefrom passed on to the plaintiff's premises, to recover the damages arising from which this suit was brought.

The plaintiff was non-suited and the case passed to the Supreme Court on exception. In delivering the opinion of the court, JOHNSON, J. said: "I have been unable to find any adjudged case like this in its facts, or bearing any near analogy to it. Had it been the case described in the complaint, of digging a pit, well or fountain, by the defendant, and opening and exposing divers springs by such excavation, which filled up the pit or well, and overflowed the same, and ran from thence upon the plaintiff's premises, where the water from such springs had not been accus-

tomed to flow, and did not naturally go, I should have no doubt that it would give a right of action to the plaintiff, should he be injured thereby. The case would fall within the maxim, '*Sic utere tuo ut alienum non lœdas.*' But no such case is made by the evidence on either side.

"There was, and had been, as far back as any one appears to have any knowledge of the premises, a living spring upon the defendant's premises at the place where he made his excavation, surrounded by a wet, marshy piece of ground, where cattle were accustomed to be watered, and water obtained for use. This was immediately adjacent to the plaintiff's land, which lay below the defendant's. The natural outlet and water-course for this marsh and spring was over the plaintiff's land, and naturally could go no where else.

"This the plaintiff does not deny, but substantially admits, though he does not admit that it was at all times a flowing spring. The defendant in order to make a more convenient and suitable place for watering his stock, dug out this spring to a depth of two or three feet below the surface, and placed therein a curb made from the trunk of a hollow tree, between two and three feet in diameter, and five or six feet in length.

"The top of the tube was placed nearly two feet above the surface of the ground, and about four inches above the surface a hole was cut, an inch or more in diameter, for the escape of the water from the curb.

"The water never overflows the curb, nor rises above the hole, but runs constantly from the hole in larger or smaller volume, as the season varies. There was a conflict of evidence in regard to the fact whether more water flowed from this curb, and upon the plaintiff's land, now, than flowed formerly from the spring and marshy place before the excavation; and had the right of action depended upon this question, the case should have been submitted to the jury.

"But in my opinion the right of action does not turn upon that question, nor upon the question whether the plaintiff's land is more or less injured by the escape of the water through it.

"The natural outlet and water-course from this spring having been always through the plaintiff's land, the defendant had an

easement there for the flow of that water. It was his water-course, and if by reason of the improvement of this spring an additional quantity of water was made to pass through it at certain seasons of the year to the plaintiff's injury, it was *damnum absque injuria*, within the principle of *Waffle v. N. Y. Cent. R. R. Co.*, 58 Barb. 413.

"The case is quite different in principle from that of drainage of falling or standing water, which has no natural outlet, upon the lands of another. But even there, a party may lawfully drain his lands into a natural water-course without being liable to an action for the consequential injury to those living upon the banks of such stream. I am prepared to hold that every owner of land has the right to clean out and tube or wall up a natural spring upon his own land, for his own use and convenience, when he does not thereby change the natural course of the flow of the water therefrom, and makes no change to the injury of another, except what may result from an increased flow of water in the natural channel and outlet of such spring. It is not such a wrongful use of the easement or abuse of the right as will give a right of action to the owner of the servient estate. It is a question simply as to whether an unlawful or improper use has been made of the natural easement by the defendant. In the view I have taken, no unlawful use has been made, and the case was properly decided at the circuit upon the plain facts. The case might very properly have been submitted to the jury, and probably would have been had the request been made by the plaintiff's counsel.

"But as no such request was made, and the law was properly applied to the facts established by the evidence, the exception to the decision is not well taken. The judgment must therefore be affirmed."

SEC. 385. In *Popplewell v. Hodgkinson*, 20 Law Times (N. S.) 578, the rights of parties to drain their lands when the effect of such drainage would be injurious to others was fully discussed. In that case the plaintiff was the mortgagee in receipt of the rents of the land, with the houses and other buildings thereon, with sculleries, ash-pits, privies and yard wall.

The defendant was a builder, and in 1867 made the excavation

and built the walls of a church called St. Gabriel's Church, on land separated from the plaintiff's land by a passage four feet wide.

On the 21st of April, 1835, Wilbraham Egerton, being seized in fee of the land on which the plaintiff's cottages as well as the church was afterward built, conveyed the land for building purposes, subject to a chief rent, to Mr. Samuel T. Harding. On the 11th of April, 1864, Harding conveyed to Coleman for building purposes, a portion of the said land, on which the plaintiff's cottages were afterward built. On the 15th April, 1864, Coleman mortgaged the same to plaintiff. On 24th April, 1864, Harding conveyed to Coleman the remaining part of the land on which plaintiff's cottages were afterward built. On 30th April, 1864, Coleman mortgaged the same to plaintiff.

On 3d June, 1864, Harding conveyed to one Esdaile the adjoining land, on which said excavation was made and the church built, and by successive conveyances the same became absolutely vested in certain persons as church trustees, for the purpose of erecting a church thereon. The church trustees entered into a contract with the defendant for making, and the defendant made, the excavations, and erected the walls of said church under the superintendence of the architect of the trustees, and with their authority. The land on which the plaintiff's cottages were erected, also the land on which the excavations were made and the said church walls erected, were considerably lower than the adjoining land, and were uneven and on a slope, at the bottom of which there had been pits of water; and said lands had been used for the purpose of shooting thereon rubbish and wet sweepings, slops, and other refuse from the streets, and were spongy and charged with moisture. Coleman, in building the plaintiff's cottages, levelled the surface of the land and did not drain the same and dig the foundations to equal depth, so that some parts penetrated into the natural soil, and other parts rested on the rubbish and refuse, without previously draining the same. The cottages so built were termed jury-built cottages, and were continually undergoing repairs down to the time of the excavations made by defendant. In making excavations for the walls of the church it was necessary for the defendant to exca-

vate down to the natural soil, and until he got a good foundation therein in some places to the depth of from ten to twenty feet below the level of Ely street. In the operation of making the excavation, and in consequence of the depth to which it was necessary for the defendant to go, the wet, spongy land on which the plaintiff's cottages were erected became drained and the water drawn from under the surface thereof. In consequence of such draining of the water, the land under the plaintiff's cottages subsided, and thereby caused the walls and structure of the sculleries, ash-pits and privies to subside and crack to a greater extent than before the excavations. The excavations, and also the erection of the church walls and filling in of excavations, were all done with proper care, and the subsidence was attributable, not to the falling in of the plaintiff's land, but to the subsidence of such land caused by the drawing off the underground water from the wet and moist land by the excavation being made by the defendant in the adjoining land at the lower levels above mentioned. The plaintiff's land would have subsided by reason of the excavations, even if the buildings had not been erected thereon, but the land would have sustained no appreciable damage. The defendant was not guilty of negligence and unskillfulness. The question for the court was whether, under the circumstances, the plaintiff was entitled to recover for the damages caused by the tapping and drawing off water from plaintiff's land. The conveyance from Harding to Coleman was a conveyance in fee, in consideration of rent charge reserved out of the land, and contained covenant by Coleman that he, his heirs, executors, administrators or assigns, would pay the said rent charge, and also, within the space of six months, erect, build and finish upon the land conveyed, ten dwelling-houses, sufficient to cover said rent, and would keep them in sufficient repair. COCKBURN, C. J., said: "There is no general rule of law by which the owner of land can be prevented, under such circumstances as these, from draining off the water for the improvement of his land. It is well settled that an owner cannot withdraw his soil so as to deprive the adjacent owner's land of its natural support; it is also well settled that where houses have, by length of time, acquired a right of support, the owner of adjacent land

cannot withdraw his soil so as to deprive them of that support. It is no removal of adjacent soil which does the mischief here, but simply the effect caused by the removal of the water through drainage. It may be that where there is a grant for a specific purpose, on the principle that no man can derogate from his own grant, a grantor may be prevented from doing any thing which would injure the grantee's land in reference to that specific purpose for which it was granted. It may be, in the case put by Mr. Holker by way of example, his contention would be well founded. If the persons who conveyed a part of Chat Moss for the express purpose of making a railway upon it, were to drain some part of the Moss so near to the railway as thereby to draw off the water and loosen the foundation, there might perhaps be a right of action, on the principle that none can be allowed to derogate from his own grant; but however that might be, that principle does not apply here for this reason: The lands of both parties are derived from a common grantor. And it must be taken as to the conveyance of the lands of the plaintiff that they were conveyed for building purposes to this extent, viz.: that there was a stipulation that the grantee should build a sufficient number of houses to secure the rent, but really I can see nothing which would at all warrant the implication of a condition that the grantor would not do with the adjoining land that which is incident to the ordinary purposes for which land is used, and especially to the purposes to which the grantee might anticipate it would be applied. In this case the land was in the vicinity of a populous town, and both the land conveyed and the land retained would obviously be applied to building purposes. Would it be under such circumstances reasonable to suppose that none of the adjoining land would be applied to building purposes, and if so applied, it would not be convenient to deal with it as has been done here? The buildings might be larger or smaller, and it might therefore become necessary to excavate and drain to a greater or less depth. It so happens that here a church was built, and to make the foundations secure, it became necessary to drain somewhat deeper than if a lighter building were erected. The argument is that the plaintiff's land was conveyed for building purposes, but there was nothing in that

to warrant the grantee in supposing that the adjoining land being also applicable to building purposes, would be wanted only for buildings of the same description as those on his own land. We cannot understand these circumstances imply a covenant not to apply such adjoining land to those purposes, and to drain for the purpose of obtaining a solid foundation, and for the convenience and advantage of the occupiers of the buildings which might be put there. There is no general obligation at law not to drain, and the obligation can only arise from the application of the principle that no one can be permitted to derogate from his own grant. Now the grant here for building purposes could give no reason to suppose that the grantor meant to withdraw the adjacent land from the most useful and natural purposes to which it might be put, or to prevent himself from doing with it what is naturally incident to such purposes. I think, therefore, that there is no reason for implying any such covenant on the part of the grantor as is here suggested, and that our judgment must be for the defendant." Thus it will be seen that a person may drain his land and relieve it of the water lying inert upon the surface, or that is under the surface mingled with the soil itself, and that if his neighbor is damaged thereby it is "*damnum absque injuria*."

SEC. 386. By the civil law the owner of higher ground has a servitude upon the lower estates, to the extent of the discharge of all the surface water from the higher estate, and the owner of the lower estate cannot prevent the water from passing over his land.

Indeed these natural servitudes may be said to be cotemporaneous with the right of property itself.¹ Every land-owner, *jure naturæ*, has a right to the continual, natural flow of running streams through his land, and no owner above or below him on the stream has a right to interfere with this right to his prejudice. A servitude is imposed upon his estate, and every estate through which the stream flows, to receive and transmit it, without let or hindrance. This is a *natural* servitude, reciprocal in its nature, and binding upon each estate through which the stream flows. Neither estate can rid itself of it, and neither estate can unreason-

¹ Pardessus, Tr., des Serv. Introduction I.

ably violate the obligations that it imposes without becoming liable for all the damage resulting therefrom.

It is upon the same principle that the servitude of receiving and discharging the surface water, arising from purely *natural* causes, is imposed upon a lower, in favor of a higher estate.¹ Although, as will be seen hereafter, this is not a reciprocal servitude, as the owner of the higher estate may, if he elects to do so, entirely divert the water from the lower estate, or deal with it as he pleases, so that he does not thereby injure others in its discharge.² But this servitude only exists in favor of the dominant estate to the extent of receiving and discharging water therefrom that arises from purely natural causes.³ The owner of the dominant estate cannot lawfully, by artificial means, change either its course or volume,⁴ and if he does, he thereby creates a nuisance which the owner of the servient estate may abate, or for which he may maintain an action.⁵

There are, however, exceptions made in favor of the dominant estate, to the extent that he may make any reasonable use of his premises for agricultural purposes, and if, from such reasonable use, the course of the surface water is changed, no action lies therefor.⁶

Judge REDFIELD, in a note to the case of *Sweett v. Cutts*, 50 N. H. 439, in the *Am. Law Register*, vol. 20, pp. 19-24, says: "The right of land-owners to deal with surface water and all water mixed with the soil, or coming from underground springs, in any manner they may deem necessary for the improvement or better enjoyment of their land, is most unquestionable; and if, by so doing, in good faith, and with no purpose of abridging or interfering with any of their neighbor's rights, they necessarily

¹ *Chasemore v. Richards*, 7 H. L. Cas. 349; *Shury v. Piggott*, 3 Bulst. 340; *Gilham v. R. R. Co.*, 49 Ill. 484; *Gormley v. Sanford*, 52 Ill. 158; *Tootle v. Clifton*, 22 Ohio St. 492; *Miller v. Laubach*, 47 Penn. St. 155; *Lattimore v. Davis*, 14 Sa. 161; *Bellows v. Sackett*, 15 Barb. (N. Y.) 96; *Kauffman v. Griesmier*, 26 Penn. St. 407; *Laumier v. Francis*, 23 Missouri, 181.

² *Broadbent v. Ramsbotham*, 11 Ex. 115; *Waffle v. R. R. Co.*, 58 Barb. (N. Y.) 413; *Livingston v. McDonald*, 21 Iowa, 160; *Frazier v. Brown*, 12 Ohio St. 357; *Goodale v. Tuttle*, 29 N. Y. 467; *Bowlesby v. Speer*, 31 N. G. 352.

³ *Kauffman v. Griesmier*, 26 Penn. St. 407; *Martin v. Jett*, 12 La. 504; *Miller v. Lambach*, 47 Penn. St. 155; *Beard v. Murphy*, 37 Vt. 104; *Hays v. Hinkleman*, 68 Penn. St. 324.

⁴ *Livingston v. McDonald*, 21 Iowa, 160; *Hays v. Hinkleman*, 68 Penn. St. 324; *Miller v. Laubach*, 47 Penn. St. 155; *Martin v. Riddle*, 26 Penn. St. 415; *Adams v. Walker*, 34 Conn. 466; *Laney v. Jasper*, 39 Ill. 54.

⁵ *Beard v. Murphy*, 37 Vt. 104.

⁶ *Livingston v. McDonald*, 21 Iowa, 160; *Goodale v. Tuttle*, 29 N. Y. 467; *Sweett v. Cutts*, 50 N. H. 439.

do damage to their neighbor's land, it must be regarded as no infringement of the maxim "*sic utere, etc.*" but must be held *damnum absque injuria*." ¹

Mr. Washburn, in his excellent work on Easements, p. 455, in referring to this note, puts this pertinent query, "How far is the *lawfulness* of the act affected by the *motive* in doing it?" I apprehend that Mr. Redfield does not intend to convey the idea in the note referred to, that the motive with which a lawful act is done, has any effect upon the question of liability, but that this is one of that class of acts where the presence or absence of proper motives determines the question of the lawfulness of the act itself. According to his statement of the law, the question of *motive* must be coupled with a fair exercise of the judgment of the owner of the estate, as to what is necessary for its improvement, and when the two concur that his acts are lawful, even though damage results to others therefrom. There can be no question that this doctrine is founded upon sound policy, and is essential to the proper development and use of land, and it seems to me that, surrounded by the safeguards suggested in the note referred to, it will never be found to operate harshly. If the owners of land were to be prevented from making necessary improvements thereon, because in so doing they would cut off a supply of surface or underground water from another estate, or because they would send on to the estate of another a tithe more or less of it, or in a different way or at a different point, or because their estate had ceased to be so valuable an escape valve as formerly for the water coming from a higher estate, it certainly would tend essentially to retard the growth of cities and towns, and that healthy progress in agricultural improvement that is essential to the full development of the resources of the country. By *necessary* improvements upon one's estate is not meant such changes in its condition as may be suggested by taste or fancy, or even the *interests* of the owner, but such improvements as are essential to the beneficial enjoyment of the property for such purposes as such property are usually devoted to.

¹The principle announced by Mr. Redfield in the note *supra* is sustained by Bowlesby v. Speer, 31 N. J. 351; Livingston v. McDonald, 21 Iowa, 160; Goodale v. Tuttle, 24 N. Y. 467; Waffle, v. R. R. Co., 58 Barb. (N. Y.) 413; Bentz v. Armstrong, 8 W. & S. (Penn.) 40; Pixley v. Clark, 35 N. Y. 532; Frazier v. Brown, 12 Ohio St. 300.

To that extent any land-owner may go, and if injury results to others it must be borne as among the incidents fairly and legitimately imposed upon their estate. A farmer cannot be prevented from ploughing his land for the purpose of cultivation, even though by so doing he turns back the surface water upon his neighbor's land that would otherwise escape over his ; but if, for his own interest, and without any other purpose than to prevent the escape of surface water over his land from his neighbor's estate, he should plough a furrow on the dividing line, he would be liable for all the damage resulting from his act.¹

If, by the construction of a house or other building, the course of surface water is changed and thereby made to flow upon the premises of another, no liability attaches for the consequences ;² but if this result is produced by the grading of the lot, and changing the level and character of its surface, liability does attach, and the person thus making the change is responsible for all the damages that ensue.³ But in Maine it is held that a person may make any change in the surface of his soil that his taste or interest dictates, and that the change in the flow of surface water thereby produced is not actionable, even though the land filled up is *swail*, if thereby no natural water-course is obstructed.⁴

Every person may drain his land in a proper manner, but he, in doing so, must exercise care that no injury results to others ; and if the drainage is effected by connecting his drain with a public sewer, he will be liable for all the damages that result to others, for any neglect in preventing the escape of water therefrom in consequence of his interference with the sewer.⁵

No one has the right to increase the flow of surface water by adding thereto water which does not originate from natural causes, and if a person does, by artificial means or otherwise, add to the natural flow of water passing over the surface of his land, whether by throwing filthy water there, or by turning the course of the water of a spring, or making changes in the surface that

¹ Tootle v. Clifton, 22 Ohio St. 492 ; Goodale v. Tuttle, 29 N. Y. 467 ; Bentz v. Armstrong, 8 W. S. (Penn.) 40.
² Livingston v. McDonald, 21 Iowa, 160 ;
³ Laney v. Jasper, 39 Ill. 54 ; Adams v. Walker, 34 Conn. 466.

⁴ Bangor v. Lansil, 51 Me. 521.
⁵ Bowlesby v. Speer, 2 Vroom. (N. J.) 351 ; Frazier v. Brown, 12 Ohio St. 300 ; Hawkesworth v. Thompson, 98 Mass. 77.

changes the course of the water, he is liable, even though no actual damage ensues.¹

But in Louisiana it is held that when, for the purposes of agriculture, a ditch or channel is dug, leading only such water into it as, in a state of nature, would find its way over the lower estate by slower process, this is not such an aggravation as renders the owner of the upper estate liable, where it does not tend to redeem swamp land, or to turn the natural course of the water in another direction,² but that a person has no right to change the natural course of the water, even though the change is in fact beneficial to the lower estate, as the owner of the servient estate has a right to elect to have the servitude exercised naturally, whether injurious to him or not.³

A person having on his premises a marshy basin of water having no natural outlet, cannot dig drains and discharge this water upon the estate of another;⁴ neither can he in any manner artificially increase the flow of water over the lower land, or throw it upon the servient estate in a manner other or different from what it naturally goes there.⁵ The owner of the inferior estate is bound to receive the water from the dominant estate, and if by building or making other erections upon his premises, he dams up the water and sustains serious damage from its discharge upon his premises, he has no legal cause of complaint, but must bear the loss as incident to his estate. He cannot change the character of the servitude by any act of his, and, however valuable his improvements, or however great the loss to him from being compelled to receive the water, he *must* receive it, and the misfortune is his own, if there is no method by which its injurious results may be avoided.⁶

SEC. 387. As has previously been stated the servitude imposed upon an estate for the discharge of surface water over it only extends to such surface water as arises from purely natural causes and goes there in a natural course. The owner of an estate can-

¹ *Beard v. Murphy*, 37 Vt. 475; *Curtis v. R. R. Co.*, 9 Mass. 428; *Butler v. Peck*, 16 Ohio St. 334.

² *Sawen v. Shiff*, 15 La. An. 300; *Harper v. Wilkinson*, 15 id. 497.

³ *Barrow v. Landy*, 15 La. An. 681.

⁴ *Butler v. Peck*, 16 Ohio St. 334.

⁵ *Livingston v. McDonald*, 21 Iowa, 180.

⁶ *Laumlier v. Francis*, 23 Miss. (Jones) 181.

not gather the water into one volume by means of a ditch, and discharge the water thus which would otherwise spread over a wide surface, or go there in a different manner, and, if such a course is taken, or even if a ditch is dug by strangers that sends the water over the lower estate in an unnatural volume, or in an unusual way, the owner of the lower estate may legally obstruct its flow, and if damage thereby results to the dominant estate, no action lies therefor, and if the ditch exists upon the estate of another, or if it exists upon a highway, and thus receives the water from one estate and discharges it over another, the person whose estate is thus drained by the ditch acquires no rights, even by long and immemorial user, to have the waters thus discharged.¹ This question was considered in a recent case in New Hampshire. *Sweet v. Cutts*, 50 N. H. 439; 9 Am. Rep. 276. In that case the plaintiff and defendant were the owners of adjoining lands along which a highway was located. There was and had been for many years a ditch running along the westerly side of the highway, in which the waters accumulating from the falling of rains and the melting of snows had been accustomed to flow, and owing to a depression in the defendant's land had always escaped there, until he built a high embankment across this depression so that the water was prevented from passing there, but was thrown back and escaped over the plaintiff's land, where it would not naturally have gone, and doing considerable damage. On the trial in the lower court the defendant requested the court to instruct the jury "that the owner of adjoining land has a right to fill it up, though by so doing he interrupts the flow of surface water from the highway. That the owner of land may lawfully occupy and improve it in such manner as either to prevent surface water which accumulates elsewhere from coming upon it, or altering the course of surface water which has accumulated thereon, or come upon it from elsewhere, although the water is thereby made to flow upon adjoining land, to another's loss." The court refused to instruct the jury as requested, but instructed them that, "if so long as memory goes back there has been a ditch on the lower side of the road, and the water

¹ *Hayes v. Hinkleman*, 68 Penn. St. 324; *Martin v. Riddle*, 26 Id. 415; *Miller v. Laubach*, 47 Id. 155.

during that time had been accustomed to accumulate there from rains and melting snows, and there was a depression in the defendant's land, by, through, or over which part of the water in the ditch has been wont to flow off over the defendant's land, then if the defendant built the embankment, and thereby caused some appreciable portion of the water from the ditch to pass off, over the plaintiff's land, which would not otherwise have done so, then the defendant was liable therefor." Judgment having been given for the plaintiff, the question came up for final decision in the supreme court, where the judgment was reversed, and the ruling of the court below repudiated. **BELLOWS, J.**, said: "In respect to water not gathered into a stream, but circulating through the pores of the earth beneath its surface, it is now settled that a land owner, who, in the reasonable use of his own land, obstructs, or diverts the flow of such water, even to the injury of his neighbor's land, is not liable to respond in damages.

"This is not upon the principle that it has been in some cases adopted, that the land owner has the absolute and unqualified property in all such water as may be found in his soil, and may therefore do what he pleases with it, as with the sand and rock that forms part of the soil, but upon the same general principle that governs the use of water flowing on the surface in well-defined streams or channels; that is, to make a reasonable use of it for domestic, agricultural and manufacturing purposes—not trenching, however, upon the similar rights of others.

"So in respect to water percolating through the soil, the land owner may ordinarily drain his land, may obstruct the usual course of the flow of such water by walls for cellars and other purposes, and may dig wells and use the water for domestic and agricultural purposes. The test is the reasonableness of the use or disposition of such water; and ordinarily that is a question of fact for the jury under the instructions of the court.

"In favor of the unqualified and absolute right of the land owner to dispose of all such water as he finds in his soil, or that he may draw there by wells dug in his own land, it is urged, that he can not know the condition of water beneath the surface, the changes that take place, or the sources of supply of the

springs and wells in the adjoining lands, or what portion is drawn from his own soil, and what was originally found in his neighbor's, and therefore that there is no ground for presuming a mutual agreement between the land owners in ages past in respect to such underground water, or for holding a right to have been acquired by use or acquiescence. So in the leading case of *Acton v. Blundell*, 12 Mees. & Wels. 336.

"In the first place, we do not understand that the right of the riparian owner to the use of streams of water running upon the surface is to be deduced from the presumed mutual agreement, or acquiescence of land owners, but rather as a natural right, incident to the land, to partake in the enjoyment of the common bounty of Providence, as in the cases of light and air.'

"And in the second place, although it may be true that in the majority of cases the condition of the water-flow beneath the surface is not accurately known, yet in a great many instances its general course, from the slope of the surface, the appearance of springs and other indications of water, is quite obvious.

"Indeed this doctrine appears to embrace that large class of cases where the water flows in sight upon the surface in wet seasons of the year, but not to such an extent as to make a regular channel with banks and sides, and also where the water moves slowly, but obviously, through boggy and swampy lands constituting the sources of streams and rivers.

"The doctrine, in fact, would justify a land owner in intercepting and diverting the water, so working its way through spongy and swampy land, at any point before it was gathered into a regular channel, although it might be obvious that such water was the source of a stream which furnished valuable mill sites, even although such diversion was in no way necessary to the enjoyment of his land.

"The contrary doctrine in respect to water percolating beneath the surface is established in this State in the well-considered case of *Bassett v. Salisbury Manufacturing Company*, 43 N. H. 569; and the question is, whether the doctrine of that case applies to water which appears on the surface in the season of melting

¹ *Dickinson v. Canal Co.*, 7 Exchq. *Chasemore v. Richards*, 2 H. & N. 168 299; *Shury v. Pigot*, 3 Bulst. 339; *Tyler v. Wilkinson*, 4 Mas. (U. S.) 397.

snow and heavy rains, but is not gathered into any regular channel or water-course, or whether such water stands upon the footing of permanent streams running upon the surface in regular channels. If upon the latter footing, then the instructions were sufficiently favorable to the defendant.

“Upon the examination of the cases which maintain the doctrine that the land owner may dispose of the water percolating beneath his soil as he pleases, they will be found to include the case of mere surface water not gathered into streams.

In *Rawstron v. Taylor*, 11 Excq. 380, it is laid down by PARKE, Baron, in the opinion of the court, that in the case of common surface water rising out of springy or boggy ground, and flowing in no definite channel, although contributing to the supply of plaintiff's mill, the supply being merely casual and the water having no defined course, the defendant is entitled to get rid of it as he pleases.

“The same doctrine is announced in *Broadbent v. Ramsbotham*, 11 Exchq. 602, which was an action for diverting water on defendant's land, which naturally flowed over the surface of a hill into a brook which supplied plaintiff's mill. The court, per ALDERSON, Baron, says the right of the plaintiff cannot extend further than the right of the flow in the brook itself, and to the water flowing in some defined natural channel, either subterranean, or on the surface, communicating with the brook itself. ‘No doubt,’ he says, ‘all the water falling from heaven and shed upon the surface of the hill, at the foot of which a brook runs, must, by the natural force of gravity, find its way to the bottom and so into the brook; but this does not prevent the owner of the land on which this water falls from dealing with it as he may please, and appropriating it. He can not, it is true, do so if the water has arrived at, and is flowing in some natural channel already formed. But he has a perfect right to appropriate it before it arrives at such a channel.’

“It is quite clear that such surface water is put upon the same footing as water percolating beneath the surface; and the cases are quite numerous that show it, and we think it should be so upon principle.

“The great objection to applying the doctrine, which forbids

the diversion of running streams, to water circulating in the pores of the earth, is, that if applied without qualification, it would to a great extent, prevent the beneficial enjoyment and improvement of one's own land. A similar effect, though less extensive, would be produced by applying that doctrine to mere surface water not gathered into any regular and defined channel. In many cases of springy and swampy lands the water moves from a higher to a lower level over a wide space, which, under such a doctrine, could not be drained, or reclaimed. So in case of rain falling upon the side of a hill, and which would naturally find its way upon the surface into a brook at the bottom, such a doctrine might effectually prevent the improvement of very extensive tracts of land.

"Again, the boundary line between what shall be deemed underground percolation, and mere surface-water, would often be extremely difficult to define, and from that source serious embarrassments might arise.

"From the nature of the case, then, we think that the line is properly drawn between water running in natural streams with well-defined channels, and that which is merely spread over the surface and flows without any regular course or channel, or circulates under the surface through the pores of the earth.

"The authorities are numerous to this point, beside those already cited.¹

"These authorities, to be sure, hold generally that, in respect to mere surface and underground water, not gathered into streams, the land-owner where it is found has the unqualified right to dispose of it as he pleases, although in some cases the right appears to be limited to cases where it is dealt with in the improvement of such owner's land, and without malice, as in *Wheatley v. Baugh*, 25 Penn. St. 532.

"But these cases concur in putting all water not gathered into water-courses, whether upon the surface or underneath, on the same footing; and so far we think they are right. As, however, the case of *Bassett v. Salisbury Manuf. Co.* holds, in respect to

¹ 3 Kent's Com. 439, note 2, and *Buffum v. Harris*, 5 R. I. 243; see, also, cases; *Ashley v. Wolcott*, 11 Cush. 192; *Ellis v. Duncan*, 21 Barb. 230; *Washb. Luther v. Winnisimmet Co.*, 9 id. 171; on *Easem.* 358, and cases cited. *Wheatley v. Baugh*, 25 Penn. St. 528;

water percolating through the soil, that the land-owner's right to obstruct or divert it is limited to what is necessary in the reasonable use of his own land, we think the same rule must be applied to mere surface-water not gathered into a stream.

"To give the land-owner the absolute and unqualified right of disposing of such water, would, in many instances, be productive of great mischief to his neighbors, and lead to interminable struggles between them; for the same power to deal with such water would exist in each land-owner when it was on his land.

"In many instances the water would assume so much the character of a natural water-course as to make the application of such a doctrine odious and unjust, while, at the same time, total want of power to modify such flow to meet the necessities of the land-owner, would often stand in the way of valuable improvements which might be made without serious detriment to any one.

"The doctrine which we maintain adapts itself to the ever-varying circumstances of each particular case, from that which makes a near approach to a natural water-course, down by imperceptible gradations to the case of mere percolation, giving to each land-owner, while in the reasonable use and improvement of his land, the right to make reasonable modifications of the flow of such water in and upon his land.

"In determining this question, all the circumstances of the case would of course be considered; and among them the nature and importance of the improvements sought to be made, the extent of the interference with the water, and the amount of injury done to the other land-owners as compared with the value of such improvements, and also whether such injury could or could not have been reasonably foreseen.

"Ordinarily, a land-owner may dig a well upon his own land, even though, by percolation, it draws the water from his neighbor's land, or even his well; but it would present a very different question if the well was dug by him with the express purpose of transferring the water in his neighbor's spring or well to his own, and knowing that this would be the result.

"So, too, the owner of extensive swamp lands, which are the

source of a river furnishing valuable mill sites, might reasonably be allowed to drain it by bringing the water into one channel, when it might be regarded as unreasonable to divert it entirely from its natural course.

“So, also, excavations maliciously made in one’s own land, with a view to destroy a spring or well in his neighbor’s land, could not be regarded as reasonable; and there would be much ground for holding that if the spring or well in his neighbor’s land could be preserved without material detriment to the land-owner making such excavations, it would be evidence of malice, or such negligence as to be equivalent to malice. *Wheatley v. Baugh*, 25 Penn. St. 532.

“In the case before us, the instructions asked for by the defendant assumed that he had the absolute and unqualified right to dispose of this water as he pleased, while the instructions given assumed that if the state of things proved had existed from time beyond memory, the defendant had no right at all to stop the flow of this water over his land, and thus cause it to flow over the plaintiff’s land.

“If this was mere surface water not gathered into a water-course, as we should infer it was from the case, the instructions upon the principles we have stated are erroneous, unless the plaintiff had acquired a right by prescription to have water flow over the defendant’s land. On that point, to constitute a title by prescription there must have been an adverse user under a claim of right for twenty years or more; but here there has been no such user; the defendant has merely permitted the surface water casually on his land to flow off over it.

“It does not appear that the plaintiff has claimed or exercised a right to discharge the water on his land upon the defendant’s land, or that he has ever done any act or put himself in a situation by reason of which the defendant could maintain a suit against him, and thus interrupt a process of gaining title by prescription.

“It is true that some water which had gathered on the plaintiff’s land may have passed off in the same way over the defendant’s land, but if it did, it was by no act of the plaintiff nor under any claim of right by him.

“So the fact that this water had passed over defendant’s land for

more than twenty years does not change its character and make it a water-course.

"In *Wood v. Waud*, 3 Exch. 778, the court holds that the right to water-courses, arising from enjoyment, is not the same in respect to *natural* and *artificial* water-courses—holding that, as to the latter, the right must depend upon their character, whether of a permanent or temporary nature, and upon the circumstances under which they are created; and, by way of illustration, say that the flow of water from a drain, for the purpose of agricultural improvement, for twenty years, could not give a right to a neighbor so as to preclude the proprietor from altering the level of his drains for the greater improvement of his land.

"This precise case arose in *Greatrex v. Hayward*, 8 Exch. 291, and was settled in accordance with this doctrine of *Wood v. Waud*. The same doctrine was applied in the case of drains for mining purposes, in *Arkwright v. Gell*, 5 Mees. & Wels. 203. In these cases, from the temporary nature of such drains and artificial water-courses, is deduced the inference that the use of the water discharged by them could not have been enjoyed as matter of right. See *Wood v. Waud*, 3 Exch. 778.

"In the subsequent case of *Rawstron v. Taylor*, 11 Exch. 369, surface water on defendant's land, for more than twenty years, had flowed over land of plaintiff into his water-course, and he had used it; but it was held that plaintiff could maintain no action against defendant for diverting it on his own land.

"In respect to water percolating beneath the surface, the tendency of the authorities is against acquiring a right by prescription. The use of such water upon one's own land is apparently rightful, and is no such invasion of the rights of the adjoining owner as would enable him to maintain a suit, for it would be impossible to know that he was drawing water from his neighbor's land. In this respect, water that comes to the surface stands on a different footing, and yet, in general, they are governed by the same rules.

"There may, doubtless, be cases where rights may be acquired by user in respect to such surface water, as in the case of eaves-drip; but it can be only when the use is adverse, and such as to give notice to the party against whom the right is acquired. In

the case before us, however, no right of the defendant was invaded by any act of the plaintiff. He, the defendant, simply permitted the water gathered by the roadside to flow over his land, and so long as he did so, he could maintain no action against any one; and we think the plaintiff had gained no right by prescription to have this water flow over defendant's land, and there must be a new trial."

SEC. 388. Mr. Washburn, in his work on Easements, p. 454, seem to regard this case as one evincing a wide departure from the doctrine of the civil law, but I do not so understand or regard the case. The question of servitude was not raised in this case, except such as was claimed to arise from prescription. The ditch through which the water was discharged did not exist upon the estate of the plaintiff, but upon the highway, and the plaintiff claimed to recover of the defendant for the injury resulting from the obstruction of the ditch, because he had acquired a *prescriptive* right to have the water from his premises discharged through it, over the defendant's land. But the court very properly held that no prescriptive right could be acquired unless the plaintiff had discharged the water from his estate over the defendant's premises *as of right* for the prescriptive periods, and that, as the ditch existed in the public highway, and as only a portion of the water flowing in it came from the plaintiff's premises, and the flow of the water there "was by no act of the plaintiff nor under any claim of right by him," he could not stand upon a prescriptive right. The doctrine of natural servitudes was not raised or discussed in the case, and the court gave no intimation as to what their opinion would have been had that question been before them. Indeed it did not appear that the water from the plaintiff's estate would ever have found its way to the defendant's premises except for the ditch. It is true that it might be fairly inferred that, if the question had been squarely raised upon the question of natural servitude, they would have held that, if the defendant filled in the depression in his land, in the exercise of a sound discretion, and it was a necessary improvement for the beneficial use of his property for the ordinary purposes to which such property is devoted, the decision would have

been the same. To that extent it would have been sustained by a large line of authorities in this country, and to that extent, I have no doubt, a court evincing the progressive tendency and rare intelligence that characterizes the supreme court of that State, would be likely to go.

And such is the law in England and most of the States of this country; although there is considerable conflict of doctrine upon this question, and no fixed rule can be given, that is applicable in all the States. In *Kauffman v. Griesmer*, 26 Penn. St. 407, the plaintiff's land sloped towards the defendant's, and there was a spring upon the plaintiff's land, the water of which, as well as the rain which fell there, flowed toward the defendant's land, but was prevented upon it by a small natural elevation of the ground, except in times of freshet or heavy rains. In order to secure the escape of the water from his premises, over the defendant's land, the plaintiff cut away a portion of this natural barrier, and opened a trench so that the water escaped over the defendant's land. The defendant erected an obstruction upon his land, and prevented the water from coming there from the plaintiff's land, except as it had been accustomed to in times of freshets. The plaintiff brought this action against the defendant for the damages resulting from the obstruction. The court held that while a man may drain his land by discharging the water through the channels in which it naturally flows, and may clear away such impediments in a stream in his own land as may be necessary to secure a free discharge of the water, though the effect should be to increase the quantity of water flowing there, yet that he has no right to dig a ditch or artificial channel for that purpose whereby the water is conveyed upon the land of another, except in its natural course, and therefore that the defendant was justified in creating the obstruction in question. The court in the course of its opinion in the case say: "Because water is descendible by nature, the owner of a dominant or superior heritage has an easement in the servient or inferior tenement for the discharge of all waters which by nature rise in or flow, or fall upon the superior. This obligation applies only to waters which flow naturally without the act of man. Those which come from springs or from rain falling directly on

the heritage, or even by the natural dispositions of the place, are the only ones to which this expression of the law can be applied. * * * This easement is called a servitude in the Roman law." In Louisiana a similar doctrine prevails.¹

SEC. 389. In the case of *Martin v. Riddle*,² there was a natural channel on the defendant's land, through which the rain and other surface water, as well as the water from some living springs escaped from the lands of the plaintiff as well as other higher lands. The defendant obstructed this channel, and the court in delivering its judgment in the case said: "I shall speak now of the general principle of the law in the matter of rain water and drainage, of the respective rights and duties of adjoining proprietors in relation thereto. They are in general the same as in the case of running water—they follow nature; nor has the owner of the upper ground a right to make any excavations or drainage by which the flow of water is diverted from its natural channel, nor can he collect into one channel waters usually flowing off into his neighbor's fields by small channels, and thus increase the waters upon the lower fields. If it be difficult to ascertain from the character of the surface what is the natural channel, then the course in which the water has long been peaceably and openly permitted to run will be considered the proper one. If the owner of the higher grounds wrongfully diverts an unnatural quantity of water upon the grounds of a lower neighbor, by collecting small streams together and discharging them in one place, or in any other manner, the owner below may have an action against him therefor."

But in this case the court say, that "while the owner of the upper fields may not construct drains or excavations so as to form new channels on the lower field, yet he may make whatever drains in his own land are required by good husbandry, either open or covered, and may discharge these into the natural channel or channels, even though, by so doing, he increases the quantity of water flowing therein."³

¹ Lattimore v. Davis, 14 La. 161; Adams v. Harrison, 4 La. An. 165; Hays v. Hays, 19 La. 391; Martin v. Jett, 12 id. 504; Hebert v. Hudson, 13 id. 54; Delahousie v. Judice, 13 La. An. 587; Minor v. Wright, 16 id. 151.
² Martin v. Riddle, 26 Penn. St. 415.
³ Washb. on Easem. 384-390, and cases cited.

SEC. 390. In *Beard v. Murphy*, 37 Vt. 99, the court say, with reference to surface water that falls upon the land of one, and would naturally escape over the lands of another, the person over whose lands the waters would thus escape has no right to prevent its escaping there. But if the owner of the higher estate attempts to pass water over the lower estate that does not originate from natural causes, the owner of the lower estate may lawfully prevent its discharge over his grounds.

SEC. 391. In a recent case in Pennsylvania, *Hays v. Hinkleman*, 68 Penn. St. 324, the doctrine previously held in that State in *Martin v. Riddle* and *Kauffman v. Greesmer*, previously referred to in this chapter, was re-affirmed. In this case, the plaintiff was the owner of a tract of seven acres of land, on which there was a house and stable; the land was situated on the declivity of a hill below and adjoining the land of the defendant. The water which collected on the land of the defendant would naturally pass down and over the land of the plaintiff, but the defendant dug ditches so as to convey the water over the plaintiff's land and in a different manner, and in greater volumes than it otherwise would have flowed, and upon one occasion the water passed down on the land of the plaintiff, tearing up the soil and working a large gully therein, to recover the damages for which this action was brought.

The judge at *nisi prius* charged the jury "that the defendant's land being the superior heritage, or located above the plaintiff's there was an easement or right on the inferior or lower lands for the discharge of all waters which by nature rise in, flow or fall upon his said lands, and the lower must necessarily be subject to all the natural flow of water from the upper one, so long as the natural flow of the water or drainage is not diverted, and the inconvenience arises from its position, and is usually more than compensated by other circumstances. The owner of the upper or superior heritage, has a right to improve and use his lands for agricultural or mining purposes in the ordinary manner, although the volume of water on the lower is thereby increased, and that no liability existed unless the defendant made a tortious or wrongful use of their property. Also, that if the injury resulted from flood, storm or other natural cause, no tort could be

imputed to him, and the supreme court fully sustained this ruling.

SEC. 392. In this case as well as the case of *Broadbent v. Ramsbotham*, given in a previous section, the doctrine is announced and sustained that there is no distinction between water falling in the form of rain and snow, and water coming from the overflow of a spring, swamp or other source, where the water squanders itself over the surface of the ground and follows no defined channel. Therefore, even though this water eventually finds its way into a water-course, and thus forms the basis of a power which is used and largely depended upon by the owners of land upon the water-course or mill owners, still, it may be diverted, turned aside, and in every respect dealt with as any other surface water, and no action can be sustained therefor.¹

SEC. 393. There seems to be a distinction made in the cases, between surface water in farm districts, and in cities and villages. In the latter localities from reasons that seem to be dictated by sound public policy, it is held that it is the duty of owners of lots in such localities, if it can be done, to so grade his lots, as to prevent the discharge of the water which accumulates or comes there from natural causes, upon the lots of another. If there is no means of preventing the discharge of the water over the land of another, owing to the grade and formation of the ground, it is a legal excuse; but where it can be done, the duty is imposed upon the owners of lots to do it. In Massachusetts this distinction is repudiated, but it would seem to be a distinction that is growing in favor with the courts of this country especially.²

SEC. 394. In *Earle v. De Hart*, 1 Beasley (N. J.) 280, it was held that where surface water even in a city, had been accustomed to collect from rains or other causes and flow off in an ancient water-course over the lands of another, the other owner had no right to prevent its escape in that manner. The court say, "To have this water discharged upon the complainant's land, is as

¹ *Buffum v. Harris*, 5 R. I. 253; *Curtis v. Ayrault*, 47 N. R. 73.

² *Livingston v. McDonald*, 21 Iowa, 160; *Goodale v. Tuttle*, 29 N. Y. 467;

Bentz v. Armstrong, 8 Watts & S. (Penn.) 40; *Bowlsby v. Spear*, 31 N. J. 352; *Pixley v. Clark*, 35 N. Y. 532.

great an injury to her building lot, as it is to the defendant's lot to have it discharged there;" and the court adds, "there can be no such difference in the application of the law as to building lots, as will impose a burden upon one, which properly and of right belongs to another." But the doctrine of this case so far as the distinction between town and city lots is concerned is somewhat shaken by the case of *Bowlsby v. Speer*, referred to in the last note.

SEC. 395. In *Gilham v. Madison Co. R. R. Co.*, 49 Ill. 484, the plaintiff was the owner of a tract of land less elevated than the land in the neighborhood, from which all the water that fell upon it, from rains or otherwise, flowed on to the land of the plaintiff, and which by means of a depression in his land, ran off his land to adjoining land, and thence into a natural lake.

The defendant, a railroad company, made a large embankment on the line of plaintiff's land, entirely filling up this channel, thereby throwing the water back on plaintiff's land. Negligence in so doing without leaving an opening in the embankment for the water to flow on and escape was alleged in the declaration. On demurrer to the declaration, it was held it stated a good cause of action. The owner of a servient heritage has no right, by embankments, or other artificial means, to stop the natural flow of the surface water from the dominant heritage, and thus throw it back upon the latter.

SEC. 396. In a recent case in California, *Ogburn v. Connor*, 46 Cal. 346, the question of the rights of higher owners, was considered. In that case the plaintiff was the owner of a farm adjoining lands of the defendant. The plaintiff's land was higher than a part of the defendant's, and through that part of the defendant's lands there was a natural depression through which the water originating from storms and other causes was accustomed to and would naturally escape. Prior to the purchase by the plaintiff of his lands, and while it was owned by the United States government, the defendant built along the line of his land what is known as a "ditch fence" for the protection of his land and his growing crops, which had the effect to prevent

the discharge of a portion of the water from the lands above (being the plaintiff's), from escaping over his land, as they would naturally do. After the purchase and occupancy of the higher land by the plaintiff in 1869, the defendant strengthened and enlarged this ditch fence so as to completely stop the discharge of water from the plaintiff's land over his premises. As a result of this, in 1871, during a severe storm, the water was set back upon the plaintiff's land, and flooded his wheat fields, doing damage estimated at \$500. Upon the trial of the case at the circuit, the judge charged the jury in accordance with the rule as adopted in Massachusetts, that the defendant had a right to prevent the flow of surface-water over his land, and was not liable for the injuries therefrom resulting. But upon appeal, this judgment was reversed, the higher court unanimously adopting the doctrine of *Martin v. Riddle*, ante, and holding that a servitude existed in favor of higher estates for the discharge of surface-waters thereon accumulating, over the lower lands.

The same doctrine had previously been adopted by the court in an unreported case. *Castro. v. Bailey*.

SEC. 397. In England the rule is firmly adhered to that all lands are burthened with the servitude of receiving and discharging all waters that naturally flow down to them from the lands of a neighbor on a higher level. And any interference with, or obstruction of, this right by the lower owner subjects him to an action for all damages which are thereby occasioned to other owners.

And, on the other hand, if the higher owner collects the surface water in one body, or sends it down to the lands of the lower owner in a different manner from that in which it is accustomed to flow, or in a concentrated form, or in unnatural quantities, he is liable for all the damages sustained therefrom by the lower owners. The servitude is to have the waters pass over the land in their natural flow, and a discharge of them in any other manner is a violation of the rights of the lower owner.¹

¹ *Shury v. Pigott*, 3 Bulstr. 340; 46; *Harrison v. Great Northern R. R. Chasemore v. Richards*, 7 H. L. C. 349. Co. 33 Law J. Exch. 287.

² *Sharpe v. Hancock*, 8 Sc. (N. R.),

SEC. 398. This right, however, only extends to water arising from natural causes, such as melting of snow and falling rains. It does not apply to water brought upon the land by artificial means, or thrown there by the upper owner or any one else. It exists as to the surplus water of a natural spring, but not as to a spring, trench or well opened by the hand of man.¹ In a late English case it was held that a lower owner might maintain an action for damages against the owner of a mine upon a higher level, who, in the process of working his mine, pumped out the water therefrom, and allowed it to escape over his own land upon the land of the lower owner. And in such a case no degree of care used to prevent such escape will excuse the upper owner if it really escapes over the lower owner's land.²

In a case in Vermont³ it was held that a lower owner would be justified in making embankments or other obstructions to the flow of surface water over his land, if the upper owner persisted in discharging other water upon his land which ran upon the lower owner's land, even though the upper owner suffered great damage in consequence. The servitude only exists as to water arising from natural causes, and if a higher owner discharges other waters over the land, it is a nuisance which is actionable and abateable by the person injured.

SEC. 399. There is in the courts of this country much conflict of doctrine in reference to the law controlling the disposition of surface water, and this is so great that it cannot be reconciled, and no definite rules can be given that will be generally applicable. In determining that question it is safe to say that the weight of authority sustains the idea that lower estates are burdened with a servitude in favor of a higher one for the discharge of the water that falls upon its surface and naturally escapes over the lower estate; and while the owner of the higher estate may, if he sees fit, prevent the water from going there, or deal with it as he pleases, so that he does not change the mode or volume of its escape, yet the owner of the lower estate may not obstruct the escape of the water over his premises

¹ Chasemore v. Richards, 7 H. L. C. 349.

² Baird v. Williamson, 33 Law J. (C. P.) 101.

³ Beard v. Murphy, 37 Vt. 104.

by any means, so as to throw it back upon the higher proprietor, except in the case of buildings erected upon city or village lots.¹

Yet in every State the practitioner will be compelled to consult the doctrine of his own courts.

CHAPTER ELEVENTH.

ARTIFICIAL WATER-COURSES.

SEC. 400. Artificial water-courses.

401. Where bed of natural stream is changed.
402. Where supply of water is artificial.
403. Easement to discharge, but none to receive water.
404. *Gaved v. Martin*.
405. *Powell v. Butler*.
406. *Magor v. Chadwick*.
407. Supply must be permanent.
408. *Wood v. Waud*.
409. *Pyer v. Carter*.
410. *Curtis v. Ayrault*.
411. *Watts v. Kelson*.
412. *Hall v. Lund*.
413. *Lampman v. Milks*.
414. Right to repair artificial water-courses and easements generally.

SEC. 400. Artificial water-courses are those where either their source or supply, or the channel through which the water flows is provided by other than natural causes, and the question as to how far, and what rights, are acquired in these by the owners of the land through which they flow, is a question of considerable, and growing importance, particularly in England where there is a greater dearth of natural streams that can be used as a motive

¹ *Laney v. Jasper*, 39 Ill. 54; *Adams v. Walker*, 34 Conn. 466; *Kauffman v. Griesmer*, 26 Penn. St. 407; *Delahoussaye v. Judice*, 13 La. 587; *Goodale v. Tuttle*, 29 N. Y. 467; *Earle v. DeHart*, 1 Beas. (N. J.) 280; *Pettigrew v. Evansville*, 25 Wis. 223; *Hoyt v. Hudson*, 27 Wis. 656; *Gormsley v. Sandford*, 52 Ill. 188; *Tootle v. Clifton*, 22 Ohio St. 247; *Bowlesby v. Speer*, 3 N. J. 357; *Nevins v. Peoria*, 41 Ill. 502; *Curtis v. Eastern R. R. Co.*, 14 Allen (Mass.), 55; *Cott v. Lewiston*, 36 N. Y. 217; *Emery*

v. Lowell, 104 Mass. 16; *Livingston v. McDonald*, 21 Iowa, 160; *Minor v. Wright*, 16 La. (An.) 151; *Laney v. Jasper*, 39 Ill. 54; *Adams v. Walker*, 34 Conn. 466; *Curtis v. Ayrault*, 47 N. Y. 73; *Buffum v. Harris*, 5 R. I. 263; *Louth v. Clifton*, 22 Ohio St. 247; *Sweet v. Cutts*, 50 N. H. 439; *Beard v. Murphy*, 37 Vt. 104; *Lanmier v. Francis*, 23 Mo. 181; *Miller v. Laubach*, 47 Penn. St. 155; *Hays v. Hinkleman*, 68 id. 324.

power, and for the numerous uses and purposes to which the water of streams is applied, than in this country. There can generally be no right to the water of an artificial water-course incident to the ownership of the land, as in the case of a natural stream, but merely an easement in the land in favor of others than the owner of the land himself. There are instances, however, where an artificial water-course may assume and possess all the attributes of a natural stream so far as the owners of the land through which it flows are concerned. But these instances only arise where the water of the artificial course has formerly flowed in a natural channel, and has been changed by power conferred by the legislature, or by contract between the parties, or where the supply is in the first instance the product of artificial causes, but is constant and runs in a given channel under a contract between the owners of the channel and of the supply, that the supply of water shall not ever be stopped or diverted from the channel.¹

SEC. 401. Instances occur frequently where, by authority conferred by the legislature, or by contract with the owners of the bed of a natural stream, the channel is changed and the water turned into a new channel and escapes in a new direction.

In these cases, the owners of the lands through which the new channel is formed, and in which the water runs, have all the rights of riparian owners in the new stream, so long as the stream flows in the new channel. In the case of *Cott v. Lewiston R. R. Co.*, 36 N. Y. 217, the liabilities of a party who changes the channel or course of a stream, either under a contract with the owner of the land through which the natural stream flows, or under legislative grant, as well as the rights of the parties owning the land through which the channel is made, were discussed, and the law in such cases established.

In that case the defendant, a railroad corporation, having located its road through the lands of the plaintiff's testator, obtained from him a conveyance of the land necessary for the construction of their road, and also obtained from an adjoining owner the same rights, and also the right to turn the waters of a stream that

¹ *Cott v. R. R. Co.*, 36 N. Y. 217.

ran through the lands of the plaintiff, and such adjoining owner through an artificial channel so as to preserve the stream to the plaintiff. The new channel was made through a deep cutting in limestone rocks, and within a few months the water began to escape through the fissures of the rock, and escaped in such quantities that for a large portion of the year the plaintiff was deprived of water. The court held that the defendants having made a new channel for the stream, were bound to make and keep the new channel in such condition that the flow of water to the plaintiff would not be diminished any more than was absolutely necessary as incident to the change. GROVER, J. said: "The change in the stream was made by the road for its own benefit. The plain intention of the statute in such a case is that the company shall restore the stream to its former proprietors, as little impaired in its utility as practicable, so as to subject such owner to no loss or injury; at any rate, to make the loss as trifling as possible. To effectuate this clear intent it must be held that the company must not only in the first instance make the channel as perfect as practicable, but continue and preserve it in that state as long as it continues to divert the water from its natural channel."

SEC. 402. As to water-courses whose supply is artificial, or produced or developed as an incident to some act done by a man upon his own property which escapes in a defined channel, or which is allowed to escape into a natural water-course, and thus adds to the natural water-course such a volume of water as makes it available for mill or other purposes, no rights are acquired, either on the part of the owners of lands through which the waters escape, or in behalf of those who have erected mills upon the natural stream, relying upon the supply of water afforded by the artificial source, which will prevent the owners of the property, upon which the water originates, from diverting it or stopping it altogether, although rights may be acquired thereto which neither a stranger, nor any person except the owners of the source of the water, can legally interfere with. This was expressly held in the case of *Arkwright v. Gell*.¹ In that case,

¹ *Arkwright v. Gell*, 5 Mees. & W. *Greatrex v. Hayward*, 8 Exch. 271; 203; *Norton v. Valentine*, 14 Vt. 239; *Wood v. Waud*, 3 id. 748; *Sampson v.*

it appeared that, in 1705, a party of adventurers had begun to construct a sough or level called the Cromford Sough, for the purpose of draining the mineral fields in the Wapentake of Winksworth, in Derbyshire; being remunerated, by agreement with the owners of the mines, by a portion of the lead ore raised within the district benefited thereby. The water from the sough flowed into a brook called the Bonsatt brook, and their united waters turned the machinery of an ancient corn mill.

In 1738 they leased this easement of continuing and maintaining the sough for 999 years. In 1771 the plaintiff took a lease, from the owner of land through which the sough passed, for 84 years, of the brook of the stream issuing into it from the sough and of the lands upon which the corn mill stood, with the right of erecting other mills thereon.

In 1772 he erected extensive cotton mills, partly on the site of the ancient corn mill, and they were worked by the united waters of the brook and the sough.

Seven years later the plaintiff purchased the absolute interest in the land through which so much of the sough was made as lay in the manor of Cromford. In 1771 the defendants had commenced the construction of another sough on a lower level, called the Meerbrook sough, for the purpose of draining a larger portion of the same mineral field, under a license from the mine owners, and thus the supply of water was cut off from the plaintiff's mills, and the plaintiff brought this suit to test his rights in the premises.

PARKE, B., in delivering the opinion of the court of exchequer said: "The stream upon which the mills were constructed was not a natural watercourse, to the advantage of which, flowing in its natural course, the possessor of the land adjoining would be entitled according to the doctrine of *Mason v. Hill*, 5 B. & Ad. 1, and in other cases. This was an artificial watercourse, and the sole object for which it was made was to get rid of a nuisance to the mines, and to enable their proprietors to get the ores which lay within the mineral fields drained by it, and the flow of water through that channel was, from the very nature of

the case, of a temporary character, having its continuance only while the convenience of the mines required it, and in the ordinary course, it would most probably cease when the mineral ore above its should have been exhausted. * * * How can it be supposed that the mine owners could have meant to burthen themselves with such a servitude, so destructive to their interests; and what is there to raise an inference of such an intention. The mine owner could not bring any suit against the person using the water, so that an omission to bring an action would raise no presumption of a grant, nor could he prevent the enjoyment of that stream of water by any act of his except by making a sough at a lower level, and thus taking away the water entirely; a course so expensive and inconvenient that it would be very unreasonable, and a very improper extension of the principle applied to the case of lights to infer from the abstinence of such an act, an intention to grant the use of the water in perpetuity, as a matter of right. * * * Suppose a steam engine is used by the owner of a mine to drain it, and the water pumped up flows in a channel to the estate of an adjoining landowner, and is there used for agricultural purposes for twenty years. Is it possible from such a user to presume a grant by the owner of the steam engine of the right to the water in perpetuity, so as to burden himself, and the assigns of his mine, with the obligation to keep a steam engine forever, for the benefit of the land owner? Or if the water from the spout of the eaves of a row of houses was to flow into an adjoining yard, and be there used by its occupants for twenty years for domestic purposes, could it be successfully contended that the owners of the houses had contracted an obligation, not to alter their construction so as to impair the flow of water? Clearly not. In all, the nature of the case distinctly shows that no right is acquired as against the owner of the property from which the course of water takes its origin, though as between the first and any subsequent appropriator of the water course itself, such a right may be acquired.’’

SEC. 403. It will be seen from the doctrine of this case, that an easement may be acquired on the part of a land owner creating a supply of water, to discharge it over the land of another,

but that the easement is not reciprocal. The owner of the supply may deal with it as he pleases. But it would seem that the court regarded the fact that the supply was not, and could not in its nature be perpetual, as an element of much importance in the case, as well as the evident convenience and purpose of the party. In a case where a person in the prosecution of some temporary business opens a spring of water which overflows and passes off in a regular channel for twenty years over the land of another, and where from the very nature of things the supply will not be stopped except from natural causes; if the stream is allowed to flow thus during the statutory period, the owner of the land upon which the supply originates would be estopped from cutting it off.¹

SEC. 404. The case of *Gaved v. Martin*, 13 Law Times (N. S.) 74, is a case of interest to the profession, as it discusses the law as to artificial water courses, and also the effect of a custom upon the acquisition of a prescriptive right. The facts of the case are as follows: The plaintiff was the tenant and occupier of china clay works on the Earl of Mount Edgecombe's estate of Carron Carron, and the defendant was the owner and occupier of an estate called Goonamath, which formerly belonged to the Trevanion family. The estates were divided by a natural valley through which ran a natural stream, called sometimes the Cox barrow brook and sometimes the Cann river. Both plaintiff and defendant were carrying on china clay works, for the profitable working of which a plentiful supply of water is required. At the time when the disputes arose which led to the action the plaintiffs works were watered by two streams, one called the Clearwater leat, used for washing the clay, and the other called the Foul-water leat, used for washing away the refuse earth. Both of these leats were artificial. The Clear-water leat crossed the Cox-barrow brook twice, being carried over it by two launders (a launder being a wooden trough or aqueduct), so as to prevent its clear water from mixing with that of the brook, which was occasionally fouled by miners higher up in its

¹ *Wood v. Waud*, 3 Exch. 748; *Beeston v. Weate*, 5 E. & B. 986; *Powell v. Butler*, 5 Irish Rep. (C. L.) 309; *Watkins v. Peck*, 13 N. H. 360; *Sampson v.*

Hodinott, 1 C. B. (N. S.) 590; *Greatrex v. Hayward*, 8 Exch. 291; *Gaved v. Martin*, 13 L. T. (N. S.) 74.

course. These launders were called the upper and lower launders, respectively. The Foul-water leat was supplied by water from the brook at a point in its course between the two launders.

The Clear-water leat was made thirty-five years before by one Hooper, who preceded the plaintiff in the occupation of Carron Carron. It collected water from natural springs, and from an adit of an old mine, and carried the water across the brook by the lower launder down to the clay works. A year afterward Hooper made the Foul-water leat to carry part of the water of the brook from a point in its course above the then recently made Clear-water launder down to the clay works. He occupied the works and used the leats for the next two or three years, and after he left them they remained unoccupied for one or two years, till the plaintiff took them in 1836. Plaintiff found the supply of water insufficient and made several attempts to increase the flow of water in the Clear-water leat. There was at the time flowing into the brook at a point above both the lower launder and the Foul-water leat, a quantity of refuse water pumped from a tin mine higher up the stream and conveyed down to the brook by an artificial water-course made by the tinnerns. Plaintiff prolonged his Clear-water leat to the place opposite where this water fell into the brook, and then placing a launder across the brook intercepted this water and caused it to flow into his Clear-water leat without mixing with the foul water of the brook. This was done twenty-two years before commencement of this action. Plaintiff enjoyed the use of these leats until the defendant came into possession of Goonamath in 1855. From that time to the time when the action was brought, defendant repeatedly took down the upper launder, but it was as often replaced by the plaintiff. He had also, from time to time, interfered with the lower launder and the Foul-water leat. For the purposes of the trial, the diversion of the stream by defendant was admitted, and the only questions disputed were those of the plaintiff's right to their flow. In addition to the above facts, it was proved that the water collected below the upper launder and carried by the lower launder to the works, was collected in lands within the Cann tin bounds and that according to the custom of Cornwall, the tinnerns

were entitled to divert all water within the tin bounds for the purposes of their mines. It was also proved that the plaintiff had, from time to time, paid sums of money to old Mr. Hooper, who had from the bound owners what is termed the "customary sett" of the bounds for the water, but it was alleged by the plaintiff, that these payments were not made as acknowledgments of his right to cut off the water, but to induce him not to foul it by throwing the dirt from his mines into it. With respect to the foul-water leat, the defendant produced two brothers by the name of Geach, who stated that at the time when the leat was made by Hooper, their father occupied Goonamath, and at a meeting of which the two tollers or managers of the Earl of Mount Edgecombe and Mr. Trevanion, the owners of the respective properties, were present, it was agreed that Hooper should be allowed to divert the brook water by means of his leat, on condition of his giving a furze prickles to old Geach every year, and of Geach's having the right, whenever the flow of water in the brook was too slack for his own purposes, to put in a turf so as to stop the plaintiff's leat and allow all the water to flow down the brook. They further stated that they knew that their father had, from time to time, exercised this right of diverting the brook water into its old channel. The two sons left the neighborhood soon afterward, but old Geach occupied his clay works till 1847. Both the tollers were dead. There was no corroboration of this story, and the plaintiff had never heard it before the trial. There was a verdict for the plaintiff, and upon hearing the cause on appeal, ERLE, C. J., said: "With respect to the claim of these parties relating to the water carried over the upper launder, upon the argument I am unable to give a confident judgment at the present moment without further consideration. With respect to the claim as to the lower launder, it seems to me that the verdict ought to stand. The water has been brought to the clay works of the plaintiff, and I take it upon the evidence that the plaintiff was in the occupation of and had an interest in the clay works, that is, the clay yard and the place where the works were carried on; and that he had such an interest as would entitle him to maintain this claim to water flowing to the tenements in his occupation. I think that his being in the occupation of the clay

yard and all the premises required for the clay works, was perfectly consistent with his having an easement to dig and search for clay all over Hooper's farm. With respect to the one he was occupier, and with respect to the other he might well have an easement, so as to be able to maintain this claim in respect of the corporeal hereditament although not in respect of the incorporeal hereditament. I think, therefore, he can claim the water by prescription. Then, does the evidence show that, as to the lower launder, although he has had it for twenty years, and enjoyed the flow of the stream for twenty years, without interruption, and as of right, that he could not acquire a right to take the water by reason that that water was collected or found in land which was subject to the tin bounds. It appears that the water flowed in a channel through land which was subject to tin bounds, and that that channel brought down a quantity of water that flowed in a mead and fell from above into the land, and so was collected, and then flowed from there to the clay works occupied by the plaintiff. If he cut that channel, and had conducted water down through the channel to the clay works for twenty years, under circumstances to which the statute applies, he would acquire a right to it. But it is said he could not have a right to the present water, because the channel down which it flowed was within land which was within the boundary of tin bounds, and that it was subject to the contingent rights of bound owners, if they chose to work the land; and it is said that water subject to those contingent rights cannot become vested in any other persons absolutely as against all the world, being within the tin bounds, and the tin-bounders being able to exercise their right at any time. I do not think that argument is tenable. If the rights of the tin-bounder are in operation, and he claims to exercise those rights, that which is called at common law the corporeal right of the tin-bounder may operate in respect of the water; but if the tin-bounder is not acting, in my opinion, the general law of the land applies to Cornwall as well as to other places, and though the land is within the boundary of tin bounds, yet, there being no tin-bounders at work, or claiming to work, or setting up any right to water, the man who dug the water-course within the land, and conducted the water for twenty years to his clay works, has

a prior right to that water, notwithstanding the water originally flowed and was within the land subject to tin bounds. That would give the plaintiff the verdict with respect to the lower launder. As to the count relating to the upper launder I must take time to consider. * * * And we are of opinion that the plaintiff acquired no right to this stream by this user thereof for twenty years, because the stream was an artificial stream made to flow over the defendant's land by the operation of miners, and the miners had not permanently abandoned their right of control over the water in the stream, when the plaintiff diverted it by the upper launder to his works. Rights and liabilities in respect of artificial water-courses when first flowing on the surface are certainly distinct from liabilities in respect of natural streams so flowing.

"The water in an artificial stream flowing in the land of the party by whom it is caused to flow, is the property of that party, and is not subject to any rights or liabilities in respect of other persons. If the stream so brought to the surface is made to flow upon the land of a neighbor, without his consent, it is a wrong for which the party causing it so to flow is liable. If there is a grant by the neighbor, the terms of the grant regulate the rights and liabilities of the parties thereto. If there is uninterrupted user of the land of the neighbor for receiving the flow as of right for twenty years, such user is evidence that the land from which the water is sent into the neighbor's land has become the dominant tenement, having a right to the easement of so sending the water, and that the neighbor's land has become subject to the easement of receiving that water. But such user of the easement of so sending on the water of an artificial stream, is, of itself alone, no evidence that the land from where the water is sent has become subject to the servitude of being bound to send on the water to the land of the neighbor below.

"The enjoyment of the easement is, of itself, no evidence that the party enjoying it has become subject to the servitude of being bound to exercise the easement for the benefit of the neighbor. A right of way is no evidence that the party entitled thereto is under a duty to walk, nor a right to eavesdropping on the neighbor's land, that the party is bound to send on

his rain-water to that land. In like manner, we consider that a party, by the mere exercise of a right to make an artificial drain into his neighbor's land, either from mine or surface, does not raise any presumption that he is subject to any duty to continue his artificial drain by twenty years' user. Although there may be additional circumstances by which that presumption would be raised, or the right proved, if it be proved that the stream was originally intended to have a permanent flow, or if the party by whom or in whose behalf the artificial stream was caused to flow, is shown to have abandoned, permanently, without intention to resume the works by which the flow was caused, and given up all right to, and control over, the stream, such stream may become subject to the law relating to natural streams. But the facts here do not raise either of those points. The law relating to natural streams is entirely different. The flow of a natural stream creates mutual rights and liabilities between all the riparian proprietors along the whole of its course. Subject to reasonable use by himself, each proprietor is bound to allow the water to flow on without altering the quality or quantity. These mutual rights and liabilities may be altered by grant, or by user of an easement to alter the stream, or by diverting, or fouling, or penning back, or the like. If the stream flows at its source by the operation of nature; that is, if it is a natural stream, the rights and liabilities of the party owning the land at its source are the same as those of the proprietors in the course below. If the stream flows at its source by the operation of man; that is, if it is an artificial stream, the owner of the land at its source, on the commencement of the flow, is not subject to any rights or liabilities toward any other person in respect to the water of that stream. The owner of such land may make himself liable to duties in respect of such water, by grant or contract, but the party claiming a right to compel performance of those duties, must give evidence of such right beyond the mere suffering by him of the servitude of receiving such water.

The rights of the plaintiff in respect of the two launders exemplify this distinction. For the lower launder the plaintiff had made a water course on the defendant's land, and collected the water of natural springs therein and brought it to this launder.

For the upper launder the plaintiff had gone to the edge of the defendant's land, and received there into the launder the water of the tie, where it would have flowed into the natural stream and become part thereof. In respect of the lower launder there was dominant *actio* and servient *patientia* for twenty years, and so there was good evidence of an easement for the plaintiff, the dominant tenant. In respect of the upper launder there was no dominant *actio* by the plaintiff, nor servient *patientia* by the defendant, on the defendant's land in respect of the stream while on that land, and so there was no presumption of a grant by the defendant, no evidence of a right in the plaintiff. For the law relating to natural streams on the surface we refer to *Mason v. Hill*, 5 B. & Ad. 1. For the law relating to subterranean water to *Chasemore v. Richards*, 2 H. & N. 168. For the law relating to artificial streams we refer to *Arkwright v. Gell*; *Magor v. Chadwick*, and *Wood v. Waud*. And for a clear exposition of the whole law on this class of easements and servitudes, we refer to Gale on Easements, 262, 3d ed. In *Arkwright v. Gell*, the law relating to artificial streams is expounded with clearness and vigor. The important and extensive rights and interests connected with mining are protected in their relation to the rights of surface owners. In this case the question arose between the surface owner and the mining owner, and it was held that the mining owner who had brought the water to the surface on the plaintiff's land for draining a mine, might divert it when deeper draining was required, and all the mines of the district that might be unwatered by the drain were properly treated as other interests. In *Magor v. Chadwick*, no law is expounded, but doubts upon the law are created by dissent from some governing propositions laid down in *Arkwright v. Gell*. The judge at the trial had not recognized any distinction between natural and artificial streams, and the court refused a new trial for misdirection on the ground that the blame of any miscarriage, if miscarriage there was, ought to be laid on the counsel who argued at the trial. The result of that case would have been pernicious to all miners and all proprietors improving land by draining; but it was followed by *Wood v. Waud*, in which the propositions laid down in *Arkwright v. Gell*, relating

to the difference between artificial and natural streams are reaffirmed. In this case the question arose between two proprietors of the surface over whose land the artificial stream flowed in its way to the natural stream, and it was held that as between them the law relating to natural streams did not govern. This case is followed by *Greatrex v. Hayward*, 11 Ex. 384, in which it was decided that a drain on the surface, made for the purpose of draining the land of the maker thereof, is an artificial stream, and is not subject to the law relating to natural streams, and might be diverted after twenty years' flow into the plaintiff's land, for the purpose of improving the drainage of defendant's land. These cases have been followed by others collected in the treatise above mentioned, and we consider that the distinction between natural and artificial streams is established in our law, and that the flow from the upper launder was not such an artificial stream that an easement could be acquired therein by twenty years' user. For these reasons we consider that the plaintiff's case, as to the upper launder, failed, and that the rule for entering the verdict on the count relating thereto for the defendant must be made absolute."

SEC. 405. In *Powell v. Butler*, 5 Irish Rep. Com. Law, 309, it appeared that the plaintiff's land adjoined the defendant Ryan's land, which adjoined the land of the defendant James Butler; that upwards of thirty years before the action was brought an artificial, defined channel was cut through those several holdings, by means of which the water of a natural stream was diverted from its natural course, and was caused to flow through Ryan's land, thence downward through Butler's land, thence downward through the plaintiff's land, and thence through the lands of other persons, until finally the water was restored to its natural channel at a lower level, and that all the persons through whose lands the water so flowed in the artificial channel held under one common landlord; that the plaintiff had for twenty years used the water flowing through the artificial channel for the purpose of irrigating his land, and so continued until November, 1869, when the defendant Ryan cut off the water from the lands of the defendant Butler and of the plaintiff, and for this obstruction the present action was brought.

As to the part taken by each of the defendants in cutting off the water from the plaintiff's land, it was admitted by the defendant Ryan that the act was his. As to the defendant James Butler, evidence was given that he had, upon two previous occasions, obstructed the water from the plaintiff's land, but had been compelled to restore it and pay the plaintiff compensation and costs; and that upon the obstruction by Ryan in November, 1869, Ryan asserted, and Butler admitted, that there was an agreement existing between them, by which Ryan was bound to cut off the water from James Butler's land. The existence of such an agreement was, however, denied by James Butler at the trial; and as to the defendant Edward Butler, it was shown that he was the son of James Butler, lived with him, managed his farm and expected to succeed to it; that the meadow land on James Butler's farm through which the artificial channel ran, was plowed in the season preceding the obstruction now complained of, and that, in reference to the latter obstruction, Edward Butler had stated to the agent of the estate that the plaintiff had no right to the water course, and should not enjoy it; that he did not care what agreement the others might come to, and that, as far as he was concerned, he would not let the plaintiff have the water.

The learned judge left two questions to the jury. (1) Whether the plaintiff was entitled to the flow of water; (2) Whether the defendants, or some of them, had obstructed it; and told them if the defendant Ryan was acting in concert with the defendant Butler in the obstruction, all three would be liable for the act; and he called attention to the conversation held by Edward Butler with the agent, and to the fact that he lived with his father, the defendant James Butler, managed the land, and expected to have it at his father's death. The jury having returned a verdict for the plaintiff, it was sustained upon appeal, upon the ground that twenty years' user of an artificial watercourse having its origin under the circumstances detailed, created a right thereto that another owner could not lawfully interfere with.

MONAHAN, C. J., in delivering the opinion said "There is no doubt a right may be acquired by user in an artificial course, and while all the evidence goes to show that the stream in this case

was created for the benefit of all the tenants through whose holdings it runs, there is nothing to suggest the truth of the view as to its origin now suggested by the defendants."

SEC. 406. But, while the owner of the land upon which the supply originates, may divert or cut off the water entirely, yet even he has no right to pollute or corrupt the water to the injury of those through whose land it passes.

While he permits the water to run they have a right to use it for any purpose they choose, and he is bound to observe in this respect the rights of the owners below, as much as though it was a natural stream.¹

But this must be understood, subject to this qualification. If the business, in the prosecution of which the water is produced, necessarily fouls the same, and the water has run thus fouled, the land owners take the water subject to such fouling as has existed in connection with the easement of flowing the water. But if the water has been suffered to run in a pure condition for twenty years, rights to the use of the water in that condition attach to the stream, and if after that time, in the necessary operations of the work through the prosecution of which the water is produced, the stream is polluted, this is a violation of the rights of those owning premises over which the water flows, and others who have acquired rights therein, and is an actionable nuisance.²

SEC. 407. In the case of *Magor v. Chadwick*, last cited, it appeared that the stream or water-course claimed by the plaintiff, flowed from the mouth of an adit, or underground passage, in adjoining lands, which had been made some fifty years before for the purpose of exhausting the water from a mine, and was made by the owner of the mine, but that the mine had not been worked for more than thirty years. That previous to that time, while the mine was in operation, the waters were charged with such dirt and impurities as were necessarily incident to the operation of the mine. But after work upon the mines had ceased, the plaintiffs erected a brewery upon the stream, and had, for

¹ *Trustees v. Dickinson*, 9 Cushing (Mass.), 454; *Woodbury v. Short*, 17 Vt. 387.

² *Magor v. Chadwick*, 11 Ad. & El. 584; *Wood v. Waud*, 3 Exch. 748.

³ *Arkwright v. Gell*, 5 M. & W. 203.

more than twenty years, enjoyed the use of the water pure and fit for that purpose.

The defendants resumed the use of the adit to discharge the water from another copper mine near the old one, after the plaintiff's rights in the stream had become fixed by twenty years user, and, as a result, the waters of the stream were fouled, and rendered unfit for the plaintiff's business.

A verdict having been found for the plaintiffs, upon hearing the case in exchequer, Lord DENMAN, C. J., said: "The imputed misdirection is, that the law of water-courses is the same, whether natural or artificial. We think this was no misdirection, but clearly right. The contrary proposition, that a water-course, of whatever antiquity, and in whatever degree enjoyed by numerous persons, cannot be so enjoyed as to confer a right to the use of the water, if proved to have been originally artificial, seems to us quite indefensible, and the late case in the exchequer leads to no such conclusion. We are by no means prepared to say that the circumstances under which a water-course has been enjoyed, may not prove it to have been without right; or that a universal practice in the neighborhood might not lead to fix the party with knowledge, that those who cleared a mine by an adit notoriously reserved to themselves the right of working the mine at any time. But this view was not pressed on the learned judge at the trial.

SEC. 408. In determining whether the owner of the supply may, after twenty years continuous discharge of the water in a given channel, divert or pollute it, regard must be had to the character of the water-course, and the uses for, and the circumstances under which it was created.

If the water-course is clearly of a temporary nature, and dependent upon the mode in which the owner of the supply may use his premises, no rights can be acquired therein, as against him, that will prevent him from cutting it off altogether.¹

The flow of water from a drain for agricultural purposes for twenty years, will not give a right so as to prevent the owner of the drain from changing its level, or doing any act in reference

Greatrex v. Hayward, 8 Welsb. & G. 292; *Wood v. Waud*, 3 Exch. 748.

thereto that may be rendered necessary for the improvement of his land. The reason is evident, for the circumstances are such as to show that the one party never intended to give, nor the other to enjoy, the use of the stream as a matter of right.¹

In *Greatrex v. Hayward*, ALDERSON, B., puts this case as an illustration: "Take the case of a farmer who, under the old system of farming, has allowed the liquid manure from his fold-yard to run into a pit in his neighbor's field, but upon finding that the manure can be beneficially applied to his own land, has stopped the flow of it into his neighbor's pit, and converted it to his own use, could it be contended that the fact of his neighbor's having used this manure for upward of twenty years, would give the latter the right of requiring its continuance."²

SEC. 409. In *Wood v. Waud*, 3 Exchq. 776, POLLOCK, C. B., says: "The right to artificial water-courses, as against the party creating them, must depend upon the character of the water-course, whether it be of a permanent or temporary nature, and upon the circumstances under which it is created. The enjoyment of a stream for twenty years diverted or penned up by permanent embankments, clearly stands upon a different footing from the enjoyment of a flow of water originating in the mode of occupation or alteration of a person's property, and presumably of a temporary character, and liable to variation. The flow of water for twenty years from the eaves of a house could not give a right to the neighbor to insist that the house should not be pulled down or altered so as to diminish the quantity of water flowing from the roof," and the court also cites the case of persons who in the use of mines pump out the waters collecting therein, and thus secure a continuous flow of the water, and adds, "It seems clear to us that the plaintiffs could not maintain an action for omitting to pump water by machinery. Nor, if the colliery owners had chosen to pump out the water from the pit, from whence the stream flowed continuously, and caused what is

¹ *Wood v. Waud*, *ante*.

² *Magor v. Chadwick*, 11 Ad. & El. 571; See *Tickle v. Brown*, 4 Ad. & El.

369; as to what is necessary to acquire an easement; also *Bright v. Walker*, 1 C. M. & R. 211.

termed the natural flow to cease, could the plaintiffs in our opinion have sued them for so doing?"¹

SEC. 410. Enough has already been said to show the grounds upon which rights to artificial water-courses attach, and the extent thereof. But there are still another class of cases that should be referred to, that bear upon the same question in a different form, and that is, when the person who owns the supply that feeds an artificial stream, also owns the land through which the same flows, divides the land into parcels and sells it with the stream flowing there, what rights to the stream do the purchasers take? Here again no doubt, the nature of the supply and the manner in which it is produced, and all the circumstances attendant thereon, as in the class of cases previously referred to, have an important bearing upon the result. In the one case, the right depends upon a positive grant of the soil, and in the other upon a presumed grant. In the case of a grant of the soil, the conveyance, if unqualified, carries with it all that is annexed thereto, as well as all easements *necessary* to the proper enjoyment of the property, which are apparent, or of such a character as to be discerned upon an inspection of the property, while in the case of a presumed grant, nothing is acquired except what is strictly in accordance with the uses under which it is claimed, and this presumption never attaches, except when it finds reasonable support from all the circumstances attendant, not only upon the user, but upon the thing claimed. In *Pyer v. Carter*, 1 H. & N. Exchq. 916, the plaintiff and defendant were the owners of adjoining tenements which had formerly belonged to one person, and been used as one house, but which he divided and made into two. In July, 1853, the owner of the whole tenement conveyed the defendant's house to him in fee, and in September of the same year conveyed the plaintiff's house to him. No reservation of an easement was continued in either conveyance. At the time of the conveyances a drain or sewer ran under the plaintiff's house, and thence under the defendant's house and discharged itself into a common sewer. The defendant obstructed

¹ *Gaved v. Martin*, L. J., N. S. C. P. 353; *Watkins v. Peck*, 13 N. H. 360; *Beeston v. Weate*, 5 E. & B. 986.

this drain, and wholly prevented the flow of waters through it where it entered his house, and as a consequence in every rain storm the defendant's house was flooded. The defendant was not aware of the existence of the drain at the time of the conveyance to him, and the plaintiff might have constructed a new drain from his house to the common sewer for a small cost. Upon these facts a verdict was entered for the plaintiff by the direction of the court, and upon hearing in exchequer the verdict was sustained, and as the case is one of importance and of general interest to the profession, and not readily accessible, I give the opinion of WATSON, B. in full. He said: "This was an action for stopping a drain that ran under both the plaintiff's and defendant's houses, taking the water from both. The cause was tried at Liverpool, before Baron BRAMWELL, when a verdict was entered for the plaintiff, and a motion was made to enter a verdict for defendant in pursuance of leave reserved at the trial.

"The plaintiff's and defendant's houses adjoined each other. They had formerly been one house, were converted into two houses by the owner of the whole property. Subsequently the defendant's house was conveyed to him, and after that conveyance the plaintiff took a conveyance of *his* house.

"At the time of the respective conveyances, the drain ran under the plaintiff's house and then under the defendant's house, and discharged itself into the common sewer. Water from the eaves of the defendant's house fell on the plaintiff's house, and then ran into the drain on plaintiff's premises, and thence through the drain into the common sewer. The plaintiff's house was drained through this drain. It was proved that by the expenditure of £6 the plaintiff might stop the drain, and drain directly from his own land into the common sewer. It was not proved that the defendant at the time of his purchase knew of the position of the drains.

"Under these circumstances we are of opinion, upon reason and upon authority, that the plaintiff is entitled to our judgment. We think that the owners of the plaintiff's houses are, by implied grant, entitled to have the use of this drain for the purpose of conveying the water from his house, as it was used at the time of the defendant's purchase. It seems in accordance with

reason that where the owner of two or more adjoining houses sells and conveys one of the houses to a purchaser, that such house in his hands should be entitled to the benefit of all the drains from his house, and subject to all the drains thus necessarily used for the enjoyment of the adjoining house, and that without express reservation or grant, inasmuch as he purchases the house such as it is. If that were not so, the inconveniences and nuisances in towns would be very great.

“Where the owner of several adjoining houses conveyed them separately, it would enable the vendee of any one house to stop up the system of drainage made for the benefit and necessary occupation of the whole.

“The authorities are strong on this subject. In *Nicholas v. Chamberlaine*, Cro. Jac. 121, it was held by all the court that ‘if one erects a house and builds a conduit thereto in another part of his land, and conveys water by pipes to his house, and afterward sells the house with the appurtenances, excepting the land, or sells the land to another, reserving to himself the house, the conduit and pipes pass with the house, because it is necessary and quasi appendant thereto, and he shall have liberty by law to dig in the land for amending the pipes or making them new as the case requires. So if a lessee for years of a house and land erect a conduit upon the land, and after the term the lessor occupies them together for a time, and afterward sells the house with the appurtenances to one, and the land to another, the vendee shall have the conduit and the pipes, and the liberty to amend them.’ *Shury v. Pigott*, Popham, 166; S. C., 3 Bulst, 339; and the case of *Coppy v. I de B.*, 11 Hen. 7; 25 Pl. 6, support this view of the case, that where a gutter exists at the time of the unity of seisin of adjoining houses it remains when they are aliened by separate conveyances, as an easement of necessity. It was contended, on the part of the defendant, that this pipe was not of necessity, as the plaintiff might have obtained another outlet for the drainage of his house at an expense of 6 l. We think that the amount to be expended in the alteration of the drainage, or in the constructing a new system of drainage, is not to be taken into consideration, for the meaning of the word ‘necessity’ in the cases above cited and in *Pennington v. Galland*, 9 Exch. 1,

is to be understood the necessity at the time of the conveyance, and as matters then stood, without alteration; and whether or not at the time of the conveyance there was any other outlet for the drainage water, and matters as they then stood, must be looked for at the necessity of the drainage.

"It was urged that there could be no implied agreement unless the easement was apparent and continuous. The defendant stated he was not aware of this drain at the time of the conveyance to him; but it is clear that he must have known or ought to have known that some drainage then existed, and if he had inquired, he would have known of this drain; therefore it cannot be said that such a drain could not have been supposed to have existed; and we agree with the observation of Mr. GALE (Gale on Easements, p. 53, 2d ed.) that by 'apparent signs' must be understood not only those which must necessarily be seen, but those which may be seen or known on a careful inspection by a person ordinarily conversant with the subject. We think that it was the defendant's own fault that he did not ascertain what easements the owner of the adjoining house exercised at the time of his purchase; and therefore we think the rule must be discharged."

The doctrine announced in this case, is a marked innovation upon the law of easements by implied grant. Yet its apparent equity commends it, and it has been favorably commented upon by numerous cases both in this country and England.¹ But it should be borne in mind that the largest latitude given as announced in this case, only includes those easements "which may be seen or known upon a careful inspection by a person ordinarily conversant with the subject." Indeed, the court say, in justification of the judgment, that "it is clear that he *must* have known, or *ought* to have known that some drainage then existed, and if he had inquired he would have known of this

¹ Curtis v. Ayrault, 47 N. Y. 73; Huttemier v. Albro, 18 id. 52; McCarty v. Kitchenman, 47 Penn. St. 243; Dodd v. Burchell, 1 H. & C. 121; Glove v. Harding, 3 H. & N. 944; Crossly v. Lighttower, 2 L. R. Ch. Ap. 478; Polden v. Bastard, 4 B. & S. 258; Ewart v. Cochran, 1 H. & C. 681; Worthington v. Gimson, 2 E. & E. 618; Butterworth v. Crawford, 46 N. Y. 349; Seymour v.

Lewis, 2 Beas. Ch. (N. J.) 439; Dunklee v. Wilton R. R. 24 N. H. 489; Hall v. Lund, 1 H. & C. 676. Questioned in Phillbrick v. Ewing, 97 Mass. 133; Carbray v. Willis, 7 Allen (Mass.), 369; Randall v. McLaughlin, 10 id. 366; Warren v. Blake, 54 Me. 276; and conditionally in Butterworth v. Crawford, ante; and in Scott v. Bentel, 23 Grat. (Va.) 1.

drain." Thus it will be seen that the doctrine is only intended to apply to such *necessary easements* as, although not apparent, would naturally be the subject of inquiry. That the court ever intended the doctrine to have a greater extent than to include easements actually apparent, and such as are of such *obvious necessity* as naturally to be the subject of inquiry, is not only quite evident from the language of the case itself, but also from the comments made upon the doctrine in later English and American cases referred to in the last note.

SEC. 411. A question arose in another form, and differing only in the fact that the ditch in question was visible to all, and its existence known, in *Curtis v. Ayrault*, 47 N. Y. 73.

In that case the question arose as to the right of parties taking their title from a common source charged with a common burthen of drainage, to interfere therewith to the prejudice of another owner. It appeared that on the 13th day of January, 1849, and for many years prior thereto, one Newbold owned and was in possession of a tract of farming land in the town of Caledonia, between the Genesee river and the Genesee valley canal, on the western part of which tract was a marsh or swamp. A small creek known as "Indian" or "Mackenzie" creek having its origin in a swamp near by, entered on the tract near its south-west corner, through a culvert under the canal, and was absorbed in a marsh in Newbold's tract.

In order to relieve the land from these waters, drains were made by the owner of the tract at different times before 1849, and among others a drain by means of an open ditch now known as the Curtis ditch, running easterly from the marsh to a cove in the river on the east end of the tract; and a drain by means of a similar ditch known as the Canal or State ditch, running northerly from Indian creek to the highway, thence along the highway to a sluice, and under the sluice to White creek.

The Curtis ditch was deepened from time to time, and formed an artificial channel through which a living stream of water ran throughout the year, and furnished water for pasturage, horses and cattle, at the east end of the tract where the cove was located.

The land was not divided by fences or otherwise until the 13th

of January, 1849, on which day Newbold sold the tract in five different parcels, by deeds dated and delivered on that day; and for aught that appears, at one and the same time.

Each deed conveyed the lands described in it by metes and bonds, "with the appurtenances and all the estate, title and interest" therein of Newbold, with warranty in the usual form, and neither deed contained any reference to any ditch or stream of water.

The plaintiff, through several mesne conveyances from the grantee of Newbold, became the owner of lot No. 5, on the most easterly parcel of said tract, which contained a portion of the "cove."

The defendant, through several mesne conveyances from parties other than those through whom the plaintiff derived title to his parcel from Newbold, acquired the title of Newbold to the most westerly portion of the tract, or lot No. 1, which embraced the marsh and the "canal" ditch.

The intermediate parcels, two, three and four, became the property of other owners.

The plaintiff, after he purchased, used the waters of the cove in watering cattle, and his predecessors, including Newbold, had done the same.

Subsequently to 1849 both the said ditches became so obstructed from neglect, that the land in lot No. 1 was again marshy and untillable.

In 1853 Henry E. Rochester, the then owner of that lot, undertook to clear out and enlarge the canal ditch and its connections, so as to make a more efficient drain in that direction. After which he sold to Swan, who, in 1864, deepened the same ditch for the same purpose; and the defendant, having purchased from Swan in 1865, continued the same work for the same purpose, and thereby caused water to flow from the marsh through the canal ditch, which would otherwise have passed through the cove ditch. The court directed the jury to find a verdict for the defendant. FOLGER, J., said: "We are of the opinion that the jury would not have been warranted in finding that there was ever a natural stream running from the mouth of Indian creek or from the marsh into the cove.

"There are some expressions which might indicate this if they were detached from the mass of the testimony and considered alone. But the strong force and preponderance of it all is that only in time of high water did the waters from the marsh flow over the banks of the river or of the cove, and not then in a regular and defined channel. When the flood had no more subsided than so as to leave a depth of three or four feet in places on the marsh, there was no overflow, and witnesses for the plaintiff say in explicit terms that before the ditch was dug there was no regular channel for the flow of the water into the cove.

"The waters which stood upon the marsh, or were held in partial suspense in the earth, were in legal effect surface waters. They belonged to the owner of the soil on which they stood or through which they soaked. He might lawfully lead them off in such direction and in such quantity as he saw fit, and no neighbor could complain, for no neighbor has a right to receive them by percolation. The owner had only to see to it that he did not injure a neighbor by discharging them upon him in unusual quantity, or at unusual places.¹

"This state of facts and this rule of law accompanying them continued until Newbold, after having made ditches, divided the tract into parcels and conveyed the parcels to different grantees. And even had he, without having made the ditches, divided the tract and conveyed the parcels to different owners, the same rule would have applied. The grantee of any parcel would have had the right to have carried off these, being surface waters, without affecting any right of any one to receive them from his land. (See cases above cited.)

But Newbold being the owner of the whole tract did very much affect and change its material condition, and the relations of different parts of it to each other. By digging ditches and deepening and extending them, he made a permanent channel by which these waters flowed in a continuous stream, from and through the parcel conveyed to the grantor of the defendant through other parcels, on to and through the parcel conveyed to

¹ *Ellis v. Duncan* (Ct. of App.), cited *v. Taylor*, 11: Exch. 369; *Broadbent v. Goodale v. Tuttle*, 29 N. Y. 466; *But- Ramsbotham*, id. 602; *Wheatley v. fum v. Harris*, 5 B. L. 243; *Rawstron Baugh*, 1 Casey, 25 Penn. St. 528.

the plaintiff's grantor. There is no doubt but that he benefited the lands now owned by the defendant by freeing them from standing water, and that the benefit conferred would continue so long as the ditch was kept open and free below.

There is no doubt but that at the present day the continuance of the ditch, and the keeping of it open and free above, would be a benefit to the lands of the plaintiff in the constant and ample supply of good water which it would afford. And if, at the time Newbold made sale of these parcels of land, these reciprocal benefits and burdens were existing and apparent, and were part of the advantages possessed by these lands, and part of the value attached to them in the estimation of those dealing with each other in regard to them, and if they contracted with a reference to such a condition of the lands, neither Newbold nor his respective grantees had right after that to change the relative condition of one parcel to the injury of another parcel in these respects. This principle is distinctly stated and clearly elucidated in several cases does not need particular discussion here.¹

The only difficulty is whether the facts of this case exactly square with the requirements of the rule in 21 N. Y.,¹ laid down in these words: "The parties are presumed to contract in reference to the condition of the property at the time of the sale, and neither has a right, by altering arrangements then openly existing, to change materially the relative value of the respective parts."

Now, some stress is laid upon the purpose which Newbold had in making the ditch, and it was claimed that it was naught else than to drain his lands. But the application of the rule does not depend solely upon the purpose for which the changes have been made in the tenement by the owner. It is the open and visible effect upon the parts which the execution of the purpose has wrought, which, presented to the view of the purchaser is presumed to influence his mind and to move him in his bargaining. We have held in a case decided in this court in September, 1871,² that this presumption may be repelled by the actual

¹ *Lampman v. Milks*, 21 N. Y. 505;
Dunkles v. The Milton R. R. Co., 4
Foster (N. H.), 480.

² *Simmons v. Cloonan*, 47 N. Y. 3.

knowledge of the contracting parties, which may negative any deductions to be drawn from the visible physical condition of the property. And so far a knowledge of the purpose of the owner is an element.

But there was testimony tending to show that, though the first and always the chief purpose of Newbold was to drain the lands more immediately affected by the marsh, there was an auxiliary purpose to furnish all other lands a constant and full supply of water.

The question whether the purchasers from Newbold contracted with him, and bought these lands in reference to their conditions at the time of sale, depends as well upon what was their purpose and understanding, and what, from the physical view of the land, might be inferred to be the effect upon them in their estimate of their advantages and value, with this artificial stream of water led through the different parts of it. And the question for decision at the trial was: Considering all the facts established by the testimony, and all the inferences properly to be made from it, and all the presumptions properly to be indulged, did the grantor of the plaintiff in arriving at the price he would pay, consider and have a right to consider as an element of the value of the land he was bidding for, this ditch across the tract, giving this supply of water through it? Now there is testimony tending to an affirmative answer, and in our judgment it was not a correct disposition of the case to take it from the consideration of the jury, and to direct a verdict in the negative.

In the first place we have shown the fact that this pure clean water ran to this parcel of land in full and constant supply. This condition of things was open and visible. The presumption arises at once that a person of even ordinary judgment in quest of a farm must perceive this advantage and be influenced by a consideration of its value. Then there is express testimony that the plaintiff's grantor, the grantee of Newbold, had been before the conveyance to him, the agent of Newbold and familiar with the premises, and that he knew that Newbold was used to pasture cattle in part on this parcel of land, and that they found their supply of water in the stream and in the cove. The testimony also tends to show that the lands are peculiarly advantageous for

the pasturage of cattle in the summer and of keeping them through the winter, with the ultimate purpose of marketing them as fat cattle, and that the supply of this water through this ditch was useful and necessary therefor. And the proof is ample that the water was of use to the land and of great value, and there is testimony tending to show that it is highly necessary to its full enjoyment.

We think that with instructions from the court to the jury in accordance with the rules announced in 21 N. Y. (*supra*) it should have been submitted to them to say whether the grantee of Newbold of the parcel of land now owned by the plaintiff, contracted for it in reference to its condition in respect to this ditch and its water at the time of the sale, and whether to be deprived of it is to lose something of value and of necessity.

Nor would an affirmative answer to it, and a judgment in accordance therewith, impose upon the defendant, as is argued, the necessity of keeping up a swamp on his land.

The benefits and burdens of this ditch are reciprocal, to be enjoyed and borne by all the lands. As the ditch was to the observation as much an aqueduct from one parcel as an aqueduct to another, so it must continue to be. And the defendant has as good right that it should lead away all the surface water and all that Indian creek brought down, as the plaintiff has that it should be led. So that, as the defendant may not obstruct the ditch to divert the water, the plaintiff may not obstruct it to prevent its flow. And as the plaintiff claims that the defendant may not ditch on his own land and drain away this water in another direction, he must permit him to open the ditch on the plaintiff's land, so that it may be effectual for the defendant's benefit.

It is also urged that the act of the defendant complained of by the plaintiff, violated no right of his, for that the ditch, the capacity of which he increased, was upon the land of the defendant's grantor when Newbold sold to the plaintiff's grantor. The act which the plaintiff complains of is the diversion of water, which, when his grantor bought of Newbold, was flowing to the land purchased. It matters not how this diversion is effected, whether by digging a new ditch or deepening an old one. The reciprocal rights of the parties (a certain state of facts existing)

are to have the status of the tract maintained as it was when Newbold sold. If water then ran through the ditch which Ayrault has deepened, he may keep a stream there of the same volume it then had, but may not increase its volume by a diversion of the water which then flowed to the plaintiff's land.

And we remark here, that we do not mean to conflict with cases cited by the respondent, such as *Arkwright v. Gell*, 5 M. and Welsby 203. We think they will be found to be cases in which the owner of land, having for a time drained the surface water from it in a certain direction, while still the owner of the same tract, and the owner of the whole of it, sees fit to change the direction of the drainage. Though he may have yielded in the first place a benefit to other land by his method, he was not precluded from abandoning it and adopting another, for he had sold none of the land benefited, to one who had contracted for it in reference to its condition of benefit. It was doing with his own as he had a right, the right of no one else having intervened by his act. It was a dominant tenement foregoing the enjoyment of an easement upon a servient one. In the case in hand, both tenements, by the acts of the former owner of both as a whole, have become each dominant and each servient to the other as their respective needs require. Had there been no drain until the severance of the great tract into parcels, and then the defendant on his parcel had drains leading to the plaintiff's parcel, which stopping afterwards, he had made others elsewhere, and of this the plaintiff had complained, the cases cited would have been in point."

SEC. 412. In the case of *Watts v. Kelson*, 6 L. R. Eq. Cas. 166, it appeared that a small stream flowed from the defendant's premises to the plaintiff's premises, and at the time of the conveyance to the plaintiff there was near the house purchased by the defendant, and on the ground purchased, a tank which stopped the natural flow of the water, and an artificial drain or culvert into which the water flowed from the tank through a considerable distance to another tank, also in the property purchased by the defendant, and from that tank there were two pipes which conducted the water to the yard of the plaintiff's cattle-sheds, where it could be used by

the occupier of the plaintiff's premises for any purpose that he required. This artificial water-course was originally made for the express purpose of supplying the cattle-sheds with water, and was made by the owner of both properties. According to several of the witnesses, it was not originally supplied with water from the upper tank, but from a lower part of the stream. It was admitted, however, that as early as the year 1860 the connection was formed between the upper tank and the drain which conducted the water to the lower tank, and that from that time the lower tank was exclusively supplied with water from the upper tank. Water was thus obtained much more pure than if it was taken from the stream after it had entered the plaintiff's land.

It was alleged by the defendant that the plaintiff having, after he purchased his own property, become in the year 1864 tenant of the property now belonging to the defendant, had altered the upper tank by making a hole in its lower side, and placing an iron hatch over the hole, and that the effect of this was to raise the water in the tank, and to increase the flow of the water through the artificial water-course. The court, however, came to the conclusion, upon the evidence, that before the iron hatch was placed on the tank there had been a wooden hatch, or some wooden contrivance, which practically served the purpose of raising the water in the tank, so as to cause it to flow freely down the artificial water-course to the lower tank, and that the plaintiff was not proved to have made any such alteration in the water-course as could affect any right to the water he might otherwise have.

The cattle sheds no longer existed on the plaintiff's land, their place being occupied by cottages, and the water being used by the tenants for domestic purposes. The judgment of the court was delivered by Sir G. MELLISH, L. J., who said: "We are clearly of opinion that the easement in the present case was in its nature continuous. There was an actual construction on the servient tenement extending to the dominant tenement by which water was continuously brought through the servient tenement to the dominant tenement for the use of the occupier of the dominant tenement. According to the rule as laid down by Chief Justice

ERLE, the right to such an easement as the one in question would pass by implication of law without any words of grant, and we think that this is the correct rule; but if words of grant are necessary, we also think that the general words in this case are amply sufficient to pass the easement. It was a water-course with the premises at the time of the conveyance, used and enjoyed.

“We may also observe that in *Langley v. Hammond* (Law Rep., 3 Ex. 161) Baron BRAMWELL expressed an opinion, in which we concur, that even in the case of a right of way, if there was a formed road made over the alleged servient tenement, to and for the apparent use of the dominant tenement, a right of way over such road might pass by a conveyance of the dominant tenement with the ordinary general words. We do not think it necessary to go through the large number of cases cited in the argument, and it will be sufficient to refer to two or three of them.

“In the old case of *Nicholas v. Chamberlain* (Cro. Jac. 121) it was held by all the court, upon demurrer, that if one erects a house, and builds a conduit thereto in another part of his land and conveys water by pipes to the house, and afterward sells the house with the appurtenances, excepting the land, or sells the land to another, reserving to himself the house, the conduits and pipes pass with the house, because they are necessary, and *quasi* appendant thereto. This case has always been cited with approval, and is identical, not only in principle, but in its actual facts, with the case now before us. It was expressly approved of by Lord WESTBURY in *Suffield v. Brown* (12 W. R., 356), where, though he objected to the decision in *Pyer v. Carter* (1 H. & N. 916), in which it was held that a right to an existent continuous apparent easement was impliedly reserved in a conveyance by the owner of two houses of the alleged servient houses, yet he seems to agree that a right to such an easement would pass by implied grant where the dominant tenement is conveyed first.

“*Wardle v. Brocklehurst* (1 E. & E., 1058) is also a direct authority, that by a grant of a farm with the usual general words the benefit of a culvert and a stream of water running through the lands of the vendor to the farm granted passed; and Lord CAMPBELL says: “The land must be taken to be conveyed in the

state in which it then was; that is, we must take it that the culvert so bringing down the water and all the water-courses are granted, not only those which belong to and appertain to the premises, but also those which were used and enjoyed therewith." This judgment was affirmed in the Exchequer Chamber, and it was held that the defendant was entitled to use the water not only for the farm which was sold to him, but for a manufactory which he possessed beyond.

"It was objected before us, on the part of the defendant, that on the severance of two tenements no easement will pass by an implied grant, except one which is necessary for the use of the tenement conveyed, and that the easement in question was not necessary. We think that the water-course was necessary for the use of the tenement conveyed. It was, at the time of the conveyance, the existing mode by which the premises conveyed were supplied with water, and we think it is no answer that if this supply was cut off possibly some other supply might have been obtained. We think it is proved on the evidence that no other supply of water equally convenient or equally pure could have been obtained. We are also of opinion, having regard to the general words in the conveyance, that the language of the conveyance was sufficient to pass the right to the water-course, even if it was not necessary, but only convenient for the use of the premises. It was further objected, that the fact of the plaintiff having pulled down the cattle sheds and erected cottages in their place, deprived him of the right to the use of water. We are of opinion, however, that what passed to the plaintiff was a right to have the water flow in the accustomed manner through the defendant's premises to his premises, and that when it arrived at his premises he could do what he liked with it, and that he would not lose his right to the water by any alteration he might make in his premises."

SEC. 413. Thus it will be seen that, when an owner of two tenements sells one of them, or the owner of an entire estate sells a portion of it, the purchaser takes the tenement or estate with all the benefits and burdens *that are used in connection with, and appear at the time of sale to belong to it*, or that are

of such *obvious necessity* as naturally to be the subject of inquiry.¹

In *Hall v. Lund*¹ a question arose between the occupants of two mills as to the rights which each took as incident to the premises under the following state of facts: The defendant occupied his mill as a bleachery, and discharged the refuse from his works through a drain, partly open and partly covered, into the stream, some three or four hundred feet above the plaintiff's mill. This discharge occurred about seven times a fortnight, and necessarily polluted the stream. Previous to the occupancy of the mill by the defendant, it had been used as a bleachery by the lessee, of whom the defendant purchased, and, in Sept., 1858, the old lease was surrendered to the landlord, and a new one executed to the defendant, who, in the lease, was described as a "bleacher." The *habendum* of the lease contained the usual clauses as to appurtenances, and also a clause by which it was agreed that all improvements, buildings, erections so made by the defendant for carrying on the business of "bleaching," should, at the expiration of the term, belong to the lessor. In 1859 the plaintiff purchased both mills, and the defendant continuing to discharge the refuse from his mills through the drains into the stream, an action was brought against him therefor. A verdict was directed for the defendant, and upon hearing in exchequer, the verdict was upheld. POLLOCK, C. B., said: "It has been urged that no apparent easement passed by the lease, and that the previous mode of the user of the premises cannot be inquired into, *but I think we are at liberty to ascertain the*

¹ *Dodd v. Burchell*, 1 H. & C. 113; *Lampman v. Milks*, 21 N. Y. 505; *Hall v. Lund*, 1 H. & C. 677.

Phear on Waters, 73, says: "Whenever the owner of lands divides his property into two parts, granting away one of them, he is taken by implication to include in his grant all such easements over the remaining part as are necessary for the reasonable enjoyment of the part which he grants, in the form which it assumes at the time he transfers it. If the grantor has already treated this portion as separate property, the mode in which he enjoyed it or suffered it to be enjoy-

ed, affords a very proper indication of what rights over his remaining land he intends to pass as accessory to it."

Mr. Gale, in his excellent work on Easements, p. 85, in discussing the question as to what constitutes an apparent easement, thus lays the foundation for the doctrine adopted by the court in *Pyer v. Carter*, "By apparent easement must be understood, not only those which must necessarily be seen, *but those which may be seen or known on a careful inspection of the premises by a person ordinarily conversant with the subject.*"

mode in which the premises had been enjoyed by the previous lessee; their enjoyment as bleaching works being the object of the lease. It is conceded that the former lessee used this stream for carrying off this refuse, and I cannot see any difference in that case and taking water from a stream and returning it in a foul condition. The lessor, with full knowledge of the mode in which the premises had been used by the former lessee, grants to the defendant a new lease for the same purpose, and the plaintiff stands in the same position as the lessor, and cannot derogate from his grant."

WILDE, B., who also delivered an opinion in the case, said: "It appears to me, that in cases of implied grant the implication must be confined to a reasonable use of the premises for the purposes for which, according to the obvious purposes of the grant, they are demised. * * * Each case must stand on its own circumstances and the intention of the parties, to be ascertained from the character, state and use of the premises at the time of the grant."

SEC. 414. In *Lampman v. Milks*, 21 N. Y. 505, it appeared that the grantor of the plaintiff and defendant originally owned a tract of about 40 acres of land through which a small creek ran. In its natural course it would run over about a half acre of low ground which was conveyed to the plaintiff for a building lot, and upon which he erected a house. Some ten years prior to the conveyance to the plaintiff the owner of the 40-acre tract diverted the water of the creek so that it did not cover the plaintiff's land. After the conveyance to the plaintiff the defendant purchased the balance of the premises, and soon afterward restored the creek to its natural channel, and thus sent the water over the plaintiff's yard. For this injury the action was brought, and upon hearing in the court of appeals DENIO, J., said: "The rule of the common law on this subject is well settled. The principle is, that when the owner of two tenements sells one of them, or the owner of an entire estate sells a portion of it, *the purchaser takes the tenement, or portion sold, with all the benefits and burdens that appear at the time of sale to belong to it, as between it and the property which the vendor retains.* * * *

No easement exists so long as the unity of possession remains, because the owner of the whole may at any time rearrange the quality of the several servitudes, but upon severance by the sale of a part, the right of the owner to redistribute ceases, *and easements or servitudes are created corresponding to the benefits or burdens existing at the time of sale.*"¹

SEC. 415. But an easement cannot be enlarged or exercised in a manner essentially different from that granted or required, or so as to injuriously affect others.² The burden must not be increased, but the right may be exercised to its full limit, and in any way that does not increase the burden or change the character of the servitude. Repairs may be made when necessary, and the owner of the dominant estate for that purpose may enter upon the servient estate and dig or do any act necessary for the purpose of making necessary repairs. Thus the owner of a mill and pond with an easement for the discharge of the water through a raceway over another's land, may enter upon the servient estate to cleanse or repair it in any way.³ The rule as adopted in *Nicholas v. Chamberlain* is recognized fully by the courts of this country. In that case it was said that "if one erects a house and builds a conduit thereto, *in another part of his land*, and convey water by pipes to the house, and afterward sells the house with the appurtenances, excepting the land, or sell the land excepting the house, *the conduit and pipes* pass with the house, because it *is necessary, et quasi*, appendant thereto; *and he shall have liberty by law* to dig in the land for amending the pipes or making them new, as the case may require."

¹ *Nicholas v. Chamberlain*, Cro. Jac. 121; *New Ipswich Factory v. Batchelder*, 3 N. H. 190; *Hazard v. Robinson*, 3 Mass. (N. S.), 272; *Thayer v. Payne*, 2 Cush. (Mass.) 327; *Cox v. Matthews*, Ventris, 237; *Parker v. Foote*, 19 Wend. (N. Y.) 309; *Coutts v. Graham*, 1 M. & W. 396; *Crompton v. Richards*, 1 Price, 27; *Riviere v. Bonner*, R. & M. 21; *United States v. Appleton*, 1 Sumner (U. S.), 492.

² *Beals v. Stewart*, 6 Lans. (N. Y. S. C.) 408; *Roberts v. Roberts*, 7 id. 55.

³ *Prescott v. Williams*, 5 Met. (Mass.) 429; *Nicholas v. Chamberlain*, Cro.

Jac. 121; *Prescott v. White*, 21 Pick. (Mass.) 341; *Pomfret v. Ricroft*, 1 Saund. 322; *Fraily v. Waters*, 7 Penn. St. 221; *Gerrard v. Cooke*, 2 B. & P. 207; *Peter v. Daniel*, 5 C. B. 568; *Williams v. Safford*, 7 Barb. (N. Y.) 309.

But this doctrine only applies to necessary easements and is not applicable to light and air, hence where one erects a house with windows opening upon another lot owned by him, and sells the house, no easement to have the light and air enter those windows passes by the deed. *Keats v. Hugo*, 115 Mass. 204.

CHAPTER TWELFTH.

MILLS AND MILL-OWNERS.

SEC 416. Relative rights of mill-owners on the same dam.

417. Right restricted to use of water according to the capacity of the stream.

418. Restrictions as to erection of dams.

419. Same continued.

420. Prescriptive rights and how acquired.

421. Prescriptive right measured by the user.

422. Rule in *Gilford v. Lake Co*

423. Rule in *Lawlor v. Potter*.

424. Rule in *Carlisle v. Cooper*.

425. Change of machinery.

426. Rights of ancient mills.

427. What constitutes a mill-seat.

428. Same continued.

SEC. 416. As between mill-owners upon the same dam, their rights are to be construed according to the grants under which they hold, and in reference to their prescriptive rights, if any have been acquired. It is said that prior appropriation, when there are other rights, gives no superior advantage or rights, and this is true. But those having mills *up* a stream have this advantage over those whose mills are lower down; they may detain the water reasonably, for the propulsion of their machinery, even though the proprietors of mills below are thereby prevented from receiving their water in as beneficial a manner as they otherwise would, and this even though the upper mill is a modern, and the lower mill is an ancient one. Such *reasonable* detention as between mill owners is no cause of complaint, and operates no violation of a right. The fault lies, not with the upper mill-owners, but in the *capacity of the stream itself*.¹ As to what is a rea-

¹ In *Thurbur v. Martin*, 2 Gray (Mass.), 394, the plaintiff had for more than 50 years been the proprietor of a dam and mill upon a stream. The defendant, being a riparian owner, erected a dam higher up the stream and used the water to propel the machinery of a mill, thereby interrupting the usual and natural flow of

water to the plaintiff's mill. The court held that the defendant was in the exercise of a lawful right; that he might lawfully apply the water to beneficial uses as against the lower mill-owner, even though the natural flow of the water to the plaintiff's mill was disturbed. *Bealy v. Shaw*, 6 East, 208; *Platt v. Root*, 16 Johns. (N. Y.)

sonable use of water on a stream, is always a question of fact to be determined by a jury, and is to be arrived at first by ascertaining the capacity of the stream, the nature and character of the works sought to be propelled thereby, the kind of wheels and machinery used, and the *reasonable* necessities of the mill-owner in view of all those facts, and the custom of the country, if there be any, in a beneficial application of the water.¹ A man must adjust his uses of the water to the capacity of the stream. He may not erect a dam and build mills to be propelled by the water of a stream, that in their requirements are far beyond the ordinary capacity of the stream to supply the power for, neither has he a right to use wheels which require an excessive amount of water to propel; but in his use, both in the requirements of the works and in the character of his machinery, he must have a reasonable regard to the ordinary capacities of the stream, and when he has thus conformed his use of the water to the capacity of the stream, he may detain the water from the mills below to the extent necessary to make it beneficial to him, even though it takes the entire water of the stream.² If, however, there is sufficient water for all the mills, if reasonably used, then it is the right of each mill-owner to require of the others such a use of the water as shall yield him his proper supply.³ The upper owner may detain the water so long as is *necessary* for the purpose of working his mills; but he must, at his peril, see to it that he does not unnecessarily or unreasonably detain it.⁴

92; Palmer v. Mulligan, 3 Caines (N. Y.), 307; Davis v. Winslow, 51 Me. 290; Parker v. Hotchkiss, 25 Conn. 351; Olney v. Fenner, 2 R. I. 211; Martin v. Bigelow, 2 Aiken (Vt.), 185; King v. Tiffany, 9 Conn. 162; Barrel v. Wells, 22 Pick. (Mass.) 237.

¹ Thomas v. Brackney, 17 Barb. (N. Y. S. C.) 654; Hill v. Waud, 2 Gilman (Ill.), 285; Gould v. Boston Duck Co., 13 Gray (Mass.), 442; Sampson v. Hoddinott, 38 Eng. Law & Eq. 241; Pollitt v. Long, 3 N. Y. S. C. Rep. (Parsons' Ed.) 232; 58 Barb. (N. Y. S. C.) 79; Hetrick v. Deshler, 6 Barr (Penn.), 32.

² Gould v. Boston Duck Co., 13 Gray (Mass.), 442; Pollitt v. Long, 3 N. Y. S. C. (Parsons' Ed.) 232; Whalen v. Ahl, 29 Penn. St. 98; Clinton v. Myers,

46 N. Y. 511; Timm v. Bear, 29 Wis. 254.

³ Snow v. Parsons, 28 Vt. 459.

⁴ Whalen v. Ahl, 29 Penn. St. 98, Pollitt v. Long, 3 N. Y. S. C. Rep. (Parsons' Ed.) 232; Snow v. Parsons, 28 Vt. 459; Parker v. Hotchkiss, 25 Conn. 321; Barrett v. Parsons, 10 Cush. (Mass.) 367. In Timm v. Barr, 29 Wis. 254, it is held that an upper mill-owner has, generally, no right to deprive the lower mill-owners of the natural flow of the water, and that in determining what is a reasonable detention, reference may be had to the kind of machinery used in the upper mill, and its adaptability for use on such a stream. See Brace v. Yale, 39 Mass. 488; Clinton v. Myers, 46 N. Y. 511.

SEC. 417. As to what *is* a reasonable detention or use of water is always a question of fact to be determined by the jury from the circumstances of each case, and in determining the question, a variety of considerations are to be considered, such as the size of the stream, the adaptability of the machinery to the ordinary condition and volume of the stream, the uses to which it is or can be applied, as well as the character of the machinery used as compared with the improvements in machinery for a similar purpose, and, in the language of FOSTER, J., in a recent case in New Hampshire, "whether, under *all* the circumstances of the case, it is or is not a reasonable use of the stream; and in determining that question the extent of the benefit to the mill-owner, and of the inconvenience to others, may very properly be considered."¹

SEC. 418. The right of a mill-owner is to *use* the water, but he has no right to divert it entirely from the stream. If he conducts it away from the stream to a mill, he must see to it that it is returned again before it leaves his premises so that an owner below is not damaged by the act.² So too, a mill-owner is bound to so maintain his dam (unless he has acquired a prescriptive right to do so otherwise) as not to set the water back upon the land, or the wheels and machinery of an upper mill,³ or so as to discharge it in a *fitful* manner, to the injury of an owner below.⁴

The rights of a riparian owner to dam the stream have been previously discussed. The right exists so long as it can be done without injury to the property or rights of others, but if a dam is erected so as to injure the lands above or below the mill by flooding them, or otherwise producing injury thereto of which the dam is the proximate cause, it is a nuisance, and its maintenance

¹ Norway Plains Co. v. Bradley, 52 N. H. 110; Hays v. Waldron, 44 id. 584; Bassett v. Salisbury Manufacturing Co., 43 id. 567.

² Sackrider v. Beers, 10 Johns. (N. Y.) 241; Brissell v. Shall, 4 Dallas (U. S.), 211; Merritt v. Brinkerhoff, 17 Johns. (N. Y.) 306; Stein v. Burden, 29 Ala. 127.

³ Wright v. Howard, 1 Sim. & Stu. (Ch.) 203; Saunders v. Newman, 1

B. & Ad. 258; Butz v. Ihric, 1 Rawle (Penn.), 218; Stiles v. Hooker, 9 Cow. (N. Y.) 266; Gilman v. Tilton, 5 N. H. 232; Hodges v. Raymond, 9 Mass. 316; Hill v. Ward, 2 Gilman (Ill.), 285; Check v. McAilly, 11 Rich. (S. C.) 153.

⁴ Stein v. Burden, 29 Ala. 127; Mabie v. Mattieson, 17 Wis. 1; Corning v. Troy, etc., 39 Barb. (N. Y. S. C.) 311; Davis v. Getchell, 50 Me. 604; Hulme v. Shrieve, 3 Green's Ch. (N. J.) 116.

unlawful.¹ If, by hoarding the water by a dam, the water is set back and held so that it impairs the health of those living on the stream, or as to impair their comfort by reason of the noxious vapors arising therefrom, this is not only an actionable but an indictable nuisance.² Or if it interferes with the drainage of lands,³ destroys springs,⁴ charges the soil with water,⁵ or causes ice to accumulate or to be thrown thereon,⁶ or in any way interferes with the natural condition of the land or the rights of land owners, its maintenance is unlawful and imposes upon those maintaining it liability for all the natural and probable consequences flowing therefrom.⁷

SEC. 419. So, too, in the erection of dams, lower owners are restricted to the erection of such dams as will not set back the water upon the wheels of upper mill-owners, or in any wise interfere with the free and unobstructed operation thereof.⁸ He cannot subtract from the power of an upper owner by throwing the water back upon him.⁹ Nor does it make any difference whether the upper owner has a mill upon his premises or not,¹⁰ and if the water is set back upon the premises of one who has a mill site, even though the lands are not overflowed, the backing of the water creates an actionable injury.¹¹

In the erection of a dam, the person erecting it is bound to regard the character of the stream, and the incidents of the locality, and if it is subject to extraordinary and violent freshets, even though occurring only at intervals of several years, he is bound to construct his dam of sufficient strength to resist such freshets, and, failing in that, he is liable for all the damages that

¹ *Hill v. Ward*, 2 Gilman (Ill.), 285; *Haas v. Chaussard*, 17 Tex. 588.

² *Kounslar v. Ward*, Gilmer (Va.), 127; *Rhodes v. Whitehead*, 27 Texas, 304.

³ *Bassett v. Company*, 43 N. H. 573; *Trustees v. Youmans*, 50 Barb. (N. Y. S. C.) 328; *Johnstone v. Roane*, 3 Jones' (N. C.) Law, 523; *Barroñ v. Lundry*, 15 La. An. 681; *Hooper v. Wilkinson*, id. 497.

⁴ *Payne v. Taylor*, 3 A. K. Marsh. (Ky.) 328; *Neal v. Henry*, 1 Meigs (Tenn.), 17.

⁵ *Pixley v. Clark*, 25 N. Y.; 35 id. 579.

⁶ *Smith v. Agawam Canal Co.*, 2 Allen (Mass.), 355.

⁷ *Amoskeag Co. v. Goodale*, 46 N. H. 53.

⁸ *Graver v. Scholl*, 42 Penn. 67; *Waring v. Martin*, Wright (Penn.), 281; *Shreve v. Voorhees*, 2 Green's Ch. (N. J.) 25; *Thompson v. Crocker*, 9 Pick. (Mass.) 59; *Good v. Dodge*, 3 Pittsburgh (Penn.), 557; *Ripka v. Sargeant*, 7 S. & R. (Penn.) 9; *Pixley v. Clark*, 35 N. Y. 525; *Stout v. McAdams*, 2 Scam. (Ill.) 67.

⁹ *Good v. Dodge*, ante.

¹⁰ *Stout v. McAdams*, ante.

¹¹ *Amoskeag v. Goodale*, 43 N. H. 56.

ensue.¹ The restriction imposed by law upon mill-owners in the erection of dams, is, that they must not essentially injure those above or below them in the use of the stream, or, as stated in a recent well-considered case in New Hampshire,² "so as not *sensibly* and *injuriously* to affect the rights of other mill-owners."

SEC. 420. Prescriptive rights by long user of the water in a particular way may be acquired, and when acquired are added to the natural right, and to the extent of such increase, are a complete defense to actions for injuries resulting from a use of the water in excess of the natural right. Prescriptive rights may not only be acquired against riparian owners either above or below him on the stream, but also against mill-owners upon the same dam. Thus one mill-owner who has the right to use a certain quantity of water from the pond by grant, and in a certain way, or at certain times of the day, may acquire the right by twenty years' adverse use in larger quantities, for a different purpose or at a different time, to use the water in a manner entirely different from the terms of his grant. But in order to acquire a prescriptive right, his use must be adverse, open, continuous, uninterrupted and as of right, and with the knowledge and acquiescence of the owner of the estate affected thereby.³

Thus it is held that when one has maintained a dam at a given height for twenty years, this raises the presumption of a grant to maintain it at that height in a state of perfect repair. But, if during that period it has not flooded the lands above, if, when repaired, it produces that result, the dam is a nuisance, and an action lies for all injuries produced by flooding the upper land the same as though it was a new dam.⁴

¹ Gray v. Harris, 107 Mass. 492.

² Norway Plains Co. v. Bradley, 52 N. H. 86.

³ Yard v. Ford, 2 Wm. Saunders, 175, 6 note; Parker v. Foote, 19 Wend. (N. Y.) 309; Luce v. Carey, 24 id. 451; Stokes v. Appomattox Co., 3 Leigh (Va.), 318; Watkins v. Peck, 13 N. H. 360; Thomas v. Marshfield, 13 Pick. (Mass.) 240; Winnepesaukee Lake Co. v. Young, 40 N. H. 420.

⁴ Stiles v. Hooker, 7 Cow. (N. Y.) 266; Russell v. Scott, 9 id. 279; Mertz v. Dorney, 25 Penn. St. 519;

but see Jackson v. Harrington, 2 Allen (Mass.), 242; Norway Plains Co. v. Bradley, 52 N. H. 108; Winnepesaukee Lake Co. v. Young, 40 id. 420; Burnham v. Kempton, 44 id. 78. See Colwell v. Thayer, 5 Met. (Mass.) 253; Ray v. Fletcher, 12 Cush. (Mass.) 200; Hinds v. Schultz, 39 Barb. (N. Y. S. C.) 600. But the right will only be co-extensive with the use, and, though the dam has been maintained at a given height for the prescriptive period, yet if during that time it has not been kept in repair, so as to set the

SEC. 421. But this must be understood as subject to the condition that the use of the water in a particular way, in order to confer a prescriptive right, must not only be "*adverse, under a claim of right, exclusive, continuous and uninterrupted,*" but such use must be *known to, and acquiesced in, by the owner of the rights affected thereby*, and the burden of proving these conditions is upon the person asserting the claim.¹ But a use of water for however long a period, lacking in either of these elements, confers no prescriptive right.²

SEC. 422. In *Gilford v. Lake Co.*, 52 N. H. 262, SMITH, J., in delivering the opinion of the court, thus laid down the rule: "Merely maintaining a dam for twenty years, without thereby raising the water on the plaintiff's land often enough to give notice that they claimed the right to flow it, would not give the defendants a prescriptive right to flow plaintiff's land as high as it *could* be flowed by means of that dam. The mere erection and maintenance of the dam did no injury to the plaintiffs, and furnished them no ground of action against the defendants. It is not the right to erect or maintain a dam upon their own land, that the defendants seek to establish by prescription, for that they have already. They may build and maintain a dam on their own land at any height; unless it pens back the water on the plaintiff's land, the plaintiffs could not complain or maintain an action against them for an invasion of their right. *It is not the height of the dam*, but of the *water*, which does the injury. It is not the height of the dam but of the water of which the plaintiffs complain. * * * To gain a prescriptive right there must be something more than a mere *intention* to do some act on the plaintiff's land. *The land owners on the shores of this lake are not bound to make annual pilgrimages to Lake village to meas-*

water back upon the lands above, the owner of the dam will be liable for all damages resulting from the setting back of the water when the dam is in repair beyond that what is covered by his use. *Carlisle v. Cooper*, 4 C. E. Green (N. J.), 260; *Mertz v. Dorney*, 25 Penn. St. 519.

¹ *Mehans v. Patrick*, 1 Jones (N. C.) 23, *Gentleman v. Soule*, 32 Ill. 279; *American Co. v. Bradford*, 27 Cal. 366;

Esling v. Williams, 10 Penn. St. 266; *Tracey v. Atherton*, 36 Vt. 514; *Evans v. Daner*, 7 R. I. 311; *Mitchell v. Parks*, 26 Ind. 354; *Finicum Fishing Co. v. Carter*, 61 Penn. St. 40; *Olney v. Gardner*, 4 M. & W. 406; *Arnold v. Stevens*, 24 Pick. (Mass.) 106; *Watkins v. Peck*, 13 N. H. 360; *Luce v. Corley*, 24 Wend. (N. Y.) 451.

² *American Co. v. Bradford*, 27 Cal. 366; *Gilford v. Lake Co.*, 52 N. H. 262

*ure the dam of the Lake Co., and employ an engineer to calculate whether, if kept tight and full, it can be used to throw water on their land."*¹

The fact that the dam owner exercised the right of flowing the land as often as he chose, is not the test. The question is, did he exercise the right so often, and in such a way, as to invade the rights of the plaintiff, and as to operate as a notice of the extent of his claim?²

So where a mill-owner has used flush boards in dry times, for the period of twenty years, taking them off upon a rise of water, he does not thereby acquire a right to maintain them upon the dam. In order to acquire a prescriptive right to the use of the water in a particular way the use must be such as is in violation of the rights of others, and such as is actionable on the part of those affected thereby, although it need not be such as to produce actual damage.³

SEC. 423. In *Lawlor v. Potter*, 1 Hannay (New Brunswick), 328, an interesting question was raised as to the right of a mill-owner to raise the water in dry seasons by means of flush boards, whereby the lands of supra-riparian owners were flooded, and rendered useless for the purposes of cultivation. It appeared that the defendant was the owner of a mill and dam, and during a dry time when the stream was low, he put on logs and raised the water and overflowed the plaintiff's lands during the dry season, more than ever had been done by the original dam, so that the plaintiff was unable to cut hay from portions of his premises bordering on the stream from which he would otherwise have been able to take it. Upon the trial of the case the judge charged the jury that, if the defendant's dam had for the period of twenty years

¹ Carlisle v. Cooper, 4 C. E. Green (N. J.), 256; Stiles v. Hooker, 7 Cow. (N. Y.) 256; Metz v. Dorney, 25 Penn. St. 519; Sargent v. Stark, 12 N. H. 332; Burnham v. Kempton, 44 id. 78; Courtauld v. Legh, L. R., 4 Ex. 126.

² Lowe v. Carpenter, 6 Ex. 825; Carr v. Foster, 3 Q. B. 581; Lake Co. v. Young, 40 N. H. 420.

³ King v. Tiffany, 9 Com. 162; Lawlor v. Potter, 1 Hannay (N. B.), 328; Mertz v. Dorney, 25 Penn. St. 519;

Carlisle v. Cooper, 6 C. E. Green (N. J.), 578; Burnham v. Kempton, 44 N. H. 90; Carlisle v. Cooper, 4 C. E. Green (N. J.), 262. But see Hall v. Augsburg, 44 N. Y. 622; Marclay v. Shultz, 28 id. 352; Hynds v. Shultz, 39 Barb. (N. Y.) 600.

⁴ Hynds v. Shultz, 39 Barb. (N. Y.) 600; Grigsby v. Clear Lake Co., 40 Cal. 407; Marclay v. Shultz, 29 N. Y. 352; Pierce v. Travers, 97 Mass. 306.

previous to the action, been maintained at its present height, and had thus been kept up and maintained continuously for the period of twenty years, and had backed up the water so as to overflow the land above, then there could be no recovery. But that, if the defendant by raising his dam by means of permanent or temporary devices, and thereby overflowed more of the upper land, or overflowed land which had only been partially flooded before, or if the original dam only overflowed the land in a particular way, and at particular seasons of the year, any change in the dam which occasioned an overflow in a different manner, or at different or other seasons of the year, would be a nuisance, and actionable as such. This judgment was affirmed upon appeal. The use of flush boards, or any devices whereby the height of the dam or the quantity of water in the pond is increased, whether in wet seasons or dry, is unlawful and a nuisance, and is actionable, even though no special damage results therefrom, because, if kept up for twenty years a right to use them is thereby gained by prescription. But this must be qualified with the condition that the water, during the season when the flush boards or other devices are used, raises the water in the channel beyond what it would be raised at that season by the original dam.

The rule generally adopted seems to be that it is not the height of the dam that regulates and measures the rights of the parties to flood the lands of supra-riparian owners, but *the height of the water as ordinarily and usually kept in the dam when kept in repair, as dams are kept for profitable and economical use.*¹

SEC. 424. In *Carlisle v. Cooper* it was held, in a case where a right to flood lands by prescription was claimed that the fact that the dam had been maintained at a given height for twenty years, was not conclusive of the right of the party to maintain his dam at that height, but that it must be shown that the dam during all that time had been maintained in such a state of repair that the right of flooding would be maintained to the full height of the dam, and that where a dam had been allowed to remain in a leaky condition and out of repair for two years, so as not to amount to

¹ *Carlisle v. Cooper*, 6 C. E. Green St. 519; *Burnham v. Kempton*, 44 N. (N. J.), 578; *Mertz v. Dorney*, 25 Penn. H. 90; *Smith v. Ross*, 17 Wis. 227.

full assertion and maintenance of the right to the full height of the dam, those two years would not be counted as a part of the prescriptive period. A different rule would certainly be productive of fraud, and would be exceedingly oppressive, as it would enable parties surreptitiously, and without the knowledge of the owners of estates to be affected thereby, to impose burdens upon their estates, without their knowledge and without the power of resistance on their part; and would also be opposed to the fundamental principles controlling the law of prescription, which requires that the use should be *open, adverse, as of right, and continuous*, during the requisite period.

The dam must be kept in such a condition as to amount to a full exercise of the right claimed during the entire period. Merely temporary suspensions in the user, such as occur from accidental¹ or necessary cause,² that are not permitted to continue for any considerable period, will not defeat the right, but a neglect to keep the dam in such a state of repair as to fairly amount to an assertion and continuance of the right to set back the water to the full extent which the dam in a perfect state of repair would set it back, would restrict the party to a use of the water commensurate only with that which he had exercised, with the dam in the condition in which it had ordinarily been maintained.

In *Mertz v. Dorney*, 25 Penn. St. 519, the defendant had for a period of twenty years maintained his dam at a given height, but during all that time it had been in a defective state of repair and leaky, so as not to hold and set back the water as it would have done if it had been kept tight and in repair. At the expiration of twenty years the defendant repaired and tightened his dam without increasing its height, and as a result the water was set back upon the plaintiff's land beyond what it had ever formerly been, during the twenty years, and it was held that the defendant was responsible for all damages resulting from the setting back of the water beyond what it had formerly been set back by the dam in its leaky and defective condition. It is the *use*, that measures the right, and this is to be determined from the ordinary effects of the dam upon the lands above, and the

¹ Hoag v. Delorme, 30 Wis. 594.

² Perrin v. Garfield, 37 Vt. 510; Brace v. Yale, 10 Allen (Mass.), 443.

condition in which the dam has been kept, together with the condition of the stream, and the uses to which it has been applied by the owner of the dam during the prescriptive period.¹

SEC. 425. As between mill-owners, an ancient mill has no right to change its machinery, by putting in such as requires more water, or as is in any measure a nuisance to other mill-owners on the stream. The antiquity of a mill affords no protection against liability for injuries thus inflicted, for, as to the new wheel or other machinery, it will be treated as a new mill.²

So, where a mill, ancient or otherwise, has been used for a particular purpose, as a saw-mill, grist-mill or paper-mill, it may not apply the water to any other class of machinery or business requiring more power to the injury of others, but it may use the same quantity of water that was formerly required in any other business, unless by grant it is specially restricted to a particular and special use.³

But when water rights are granted with specific restrictions as to the application of the water, it must be applied only in the mode specified in the grant. The restrictive clause must, however, be positive and unequivocal, and clearly import an intention on the part of the parties thereto to restrict the use of the water to a particular class of business, and that only. Thus a conveyance of a fulling-mill in these words, "together with water sufficient to operate the fulling-mill thereon standing," would not restrict the grantee to the use of the water for a fulling-mill, but would authorize the use of an equal quantity for any other purpose. But where the language of the grant is specific and clearly indicated an intention to restrict the use of the water to a special use, as "together with water sufficient to operate the fulling-mill

¹ *Murdy v. Shultz*, 39 Barb. (N. Y. S. C.) 600; *Carlisle v. Cooper*, 6 C. E. Green (N. J.), 578; *Pierce v. Travers*, 97 Mass. 306; *Powell v. Lash*, 64 N. C. 456; *Hoag v. Delorme*, 30 Wis. 594; *Metz v. Delorme*, 25 Penn. St. 519; *Carlisle v. Cooper*, 4 C. E. Green (N. J.), 260; *Darlington v. Painter*, 7 Penn. St. 473; *Burnham v. Kempton*, 44 N. H. 78; *Stiles v. Hooker*, 7 Cow. (N. Y.) 266; *Gilford v. Lake Co.*, 52 N. H. 262.

² *Simpson v. Leaney*, 8 Greenl. (Me.) 138; *Pratt v. Sampson*, 2 Allen (Mass.), 273; *Bardwell v. Ames*, 22 Pick. (Mass.) 354; *Adams v. Warner*, 23 Vt. 395; *Dewey v. Williams*, 40 N. H. 227; *Kaler v. Beaman*, 49 Me. 208; *Olmstead v. Loomis*, 6 Barb. (N. Y.) 152; *Wakeley v. Davidson*, 26 N. Y. 387; *Miller v. Lapham*, 44 Vt. 433.

³ *Miller v. Lapham*, 44 Vt. 433.

thereon standing *and for no other purpose*," this would restrict the use of the water to that purpose alone, and any different use would be actionable.¹ Indeed *any* language in the granting clause that indicates a clear intention on the part of the grantor to limit the use of the water to a particular class of business or machinery will be operative to that end.²

SEC. 426. In reference to what are termed ancient mills, it may be said that the mere fact that a mill is ancient and has had the entire use of the water of a stream does not confer a right upon the owners to use the water at their own convenience or as their interests may dictate, as against a new mill lower down the stream. But, when a lower mill is erected, the ancient mill is bound to a reasonable and proper use of the water in reference to the rights of the new mill, and any *unreasonable* detention or use of the water is a nuisance to the lower mill, and actionable the same as though the upper mill was also a new one.³

It may be understood as a settled rule of law that priority of occupation, in the use of water, by a mill-owner, gives him no such rights as will deprive those above or below him on the stream from also turning the water to beneficial purposes. He simply acquires the right to use the water in its natural flow, and, while an owner above or below him cannot do any act in violation of his rights by unreasonably detaining it from his mill on the one hand or setting it back upon his wheels upon the other, neither can he make an unreasonable use of the water to their injury.⁴ It may be said, however, that he who is first in point

¹ *Tortelot v. Phelps*, 4 Gray (Mass.), 370; *Shed v. Leslie*, 22 Vt. 498; *Dishon v. Porter*, 38 Me. 289; *McDonald v. Askeny*, 29 Cal. 207. But in all cases where the language of the grant will admit of its being construed as the *measure* rather than the *quality* of use, the courts will so construe it. *Adams v. Warner*, 23 Vt. 395; *Cromwell v. Selden*, 3 N. Y. 253; *Salmon v. Rudd*, 6 N. Y. 22; *Pratt v. Samson*, 2 Allen (Mass.), 275; *Kaler v. Beaman*, 49 Me. 208; *Wakeley v. Davidson*, 26 N. Y. 387.

² *Strong v. Benedict*, 5 Conn. 219.

³ *Barrett v. Parsons*, 10 Cush. (Mass.) 367.

⁴ *Martin v. Bigelow*, 2 Aiken (Vt.),

184; *Gould v. Boston Dock Co.*, 13 Gray (Mass.), 442; *Thurber v. Martin*, 2 id. 394; *Tyler v. Wilkinson*, 4 Mason (U. S.), 397; *Davis v. Getchell*, 50 Me. 604; *Springfield v. Harris*, 4 Allen (Mass.), 494.

In California it is held, if the first appropriator only takes a part of the water, or only uses it during certain times, another may take the surplus or use it for the balance of the time. *Smith v. O'Hara*, 43 Cal. 371; *Thorp v. Freed*, 1 Mon. T. 651; *Columbia Mining Co. v. Haller*, id. 296.

In Maine it is held that as between owners of dams on the same stream he has the best right who is first in point of time. *Lincoln v. Chadborne*, 56 Me. 197.

of time in turning the water of a stream to a beneficial use has the right to water sufficient to operate his mill, even though the effect be, in a reasonable use thereof, to destroy the value of a lower privilege.¹

SEC. 427. It is not every riparian owner who may erect a dam upon the stream, nor indeed can it ever be lawfully done, when the dam will raise the water beyond its natural surface, to the injury of other owners.² A dam may be erected whether upon a fall or not, so as to raise the water up to the level of his own land, but no further.³ If there be no fall upon the land, and no method by which a mill can be propelled by the water, there is no mill seat, and no right on the part of the riparian owner to pen back the water to the injury of others, for the law will not recognize the right of interfering with the natural flow of a stream, to the injury of others, except when the water is applied to a beneficial purpose.⁴ No rights are acquired by a frivolous use of water, as by the erection of a dam for the simple purpose of turning a wheel to which no machinery is attached, and which serves no useful end or beneficial purpose.⁵

SEC. 428. Where water flows through land upon what is termed a "*dead level*," with no perceptible fall, it can hardly be said that a man has a "*mill seat*" or "*mill privilege*," within the meaning of the law. But if there is a point upon his land to which the water can be directed with sufficient momentum and fall to be beneficially applied as a power, the owner may thus divert it, if he can and does again return it to its original channel before it leaves his land; but he cannot divert the water entirely from its natural channel for any purpose.⁶

¹ Hatch v. Dwight, 17 Mass. 289; Chandler v. Howland, 7 Gray (Mass.), 348; Thurber v. Martin, 2 id. 394; Smith v. Agawam Canal Co., 2 Allen (Mass.), 355. But see King v. Tiffany, 9 Conn. 162; Butman v. Hussey, 12 Me. 407; Pool v. Lewis, 41 Ga. 168; Omelvaney v. Jagers, 2 Hill (N. Y.), 634.
² Colwell v. May's Landing Co., 19 N. J. 248.

³ McCalmont v. Whittaker, 3 Rawle (Pa.), 84; Brown v. Bush, 45 Penn. St. 66; Rhodes v. Whitehead, 27 Tex. 310.

⁴ Stackpole v. Curtis, 32 Me. 382; Russell v. Scott, 9 Cowen (N. Y.), 281.

⁵ Jackson v. Vermilyea, 6 Cow. (N. Y.) 677; Weaver v. Eureka Co., 15 Cal. 271.

⁶ Davis v. Fuller, 12 Vt. 178; Van Hoesen v. Coventry, 10 Barb. (N. Y. S. C.) 518; Binney's Case, 2 Bland's (Md.) Ch. 99; Bardwell v. Ames, 22 Pick. (Mass.) 333; Crittenden v. Field, 8 Grey (Mass.) 621; Samuels v. Bradford, 25 Wis. 327; Brace v. Yale, 10 Allen (Mass.), 447; Bealey v. Shaw, 6 East, 205; Proctor v. Jennings, 6 Nev. 87; Baldwin v. Calkins, 10 Wend. (N. Y.) 167; Rex v. Trafford, 1 B. & Ad. 874; Lord v. Comrs of Sidney, 12 Moore's P. C. 473.

It is the right of every owner of land upon a stream to have the water come to him in its natural flow, undiminished in quantity and unimpaired in quality, and it may be added with no increase of its volume except from drainage or natural causes. Therefore it is an actionable nuisance at common law for a mill-owner or other person to turn a new stream into the stream, or by means of a reservoir or otherwise to increase the volume of water naturally flowing in the stream.¹ It is no defense to an action for such an injury, that the person complaining is benefited by the increase in the volume of water, for no person can be compelled to have his premises improved, and has a right to their enjoyment in their natural condition and according to his own tastes and inclinations. This does not extend, however, to water resulting from the drainage of land on the stream, for that is a right that is rendered necessary for the proper cultivation of the land, and is lawful, even though it results in increasing the volume of the stream.² But if foreign water is turned into a stream by a mill-owner, while it runs there he will have a right to use water in excess of his grant or original right, to the extent of the excess thus turned into the stream.³

CHAPTER THIRTEENTH.

SMOKE.

- SEC. 429. Right to the air in its natural purity.
 430. The right to pure air not an absolute right.
 431. Impregnations that are actionable.
 432. Reasonable uses of property for ordinary purposes exceptional.
 433. Steam engine, use of, nuisance, when? *Sampson v. Smith*.
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 436. Ordinary uses must be reasonable.
 437. Smoke that vitiates taste, a nuisance. *Saville v. Killner*.
 438. Pungent smoke, soiling clothes hung out to dry. *Cartwright v. Gray*.

¹ *Tillotson v. Smith*, 32 N. H. 90; *St. 407*; *Martin v. Jett*, 12 La. 501; *Merritt v. Parker, Coxe* (N. J.), 460. *Williams v. Gale*, 3 Har. & J. 231.

² *Kauffman v. Griesmier*, 26 Penn. ³ *Burnett v. Whitesides*, 15 Cal. 35.

SEC 439. Smoke alone as a nuisance.

- 440. Smoke alone, or noise alone, may be a nuisance. *Crump v. Lambert.*
- 441. Smoke that injures property or impairs its enjoyment.
- 442. Impregnation of air with smoke, gas and dust. *Hutchins v. Smith.*
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- 458. Same continued. *Bamford v. Turnley.*
- 459. Same continued. *Carey v. Ledbitter, Bareham v. Hall.*
- 460. Fact that plaintiff could avoid injury by different use of property, no defense.
- 461. Business must produce injury. *Luscombe v. Steere.*
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- 463. *Huckenstine's Appeal.*
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- 465. Use of fuel that produces destructive vapors. *Campbell v. Seamen.*
- 466. *Huckenstine's Appeal* reviewed.
- 467. Brick burning subject to the same rules as other occupations.

SMOKE.

SEC. 429. Every person has a right to have the air diffused over his premises in its natural state, free from all artificial impurities.¹ Indeed it may be said that no one has a right to interfere with the supply of pure air that flows over another's land, any more than he has to interfere with that neighbor's soil.² The right is a natural one, and is just as well recognized by the courts as the right to the natural flow of water. Therefore every use of one's property that produces an unwarrantable impregnation

¹ *Walter v. Selfe*, 4 Eng. Law & Eq. 15.

² *Saville v. Killner*, 26 L. T. (N. S.) 277.

of the atmosphere with foreign substances, to the detriment of another is a nuisance, and actionable as such.¹ This is true, whether the injury arises from smoke,² noxious vapors,³ noisome smells,⁴ or from loading the atmosphere with dust,⁵ chaff⁶ or other foreign substances that would not exist there, except for the act of the party through whose instrumentality it is communicated.⁷

SEC. 430. By an atmosphere free from artificial impurities, is meant, not air as free and pure as it naturally is, entirely devoid of impregnation from artificial cause, but an atmosphere as free and pure as could reasonably be expected, in view of the location, and its business.⁸ If the strict rule applicable to natural rights was applied, it would seriously disturb not only the business, but also the moral and social interests of society. Therefore the law relaxes the strict rigor of the rule, and does not recognize every business or use of property as a nuisance that imparts a degree of impurity to the air, for if such was the case, towns could not be built, nor life in compact communities be tolerated, and even the *ordinary* uses of property would be seriously interfered with, for in proportion to the sparseness or compactness of population, is the air pure or impure. One cannot reasonably occupy a dwelling-house or place of business and use any kind of fuel therein, without imparting more or less of impurity to the atmosphere, and in proportion as these are aggregated in one locality, are these impurities increased; but as these are among the common necessities of life, and absolutely indispensable to its reasonable enjoyment, the law does not recognize them as being actionable interferences with the rights of others, unless exercised in an un-

¹ *Duncan v. Hayes*, 22 N. J. 26; *Higgins v. Guardians of the Poor*, 26 L. T. (N. S.) 752.

² *Rhodes v. Dunbar*, 58 Penn. St. 275; *Galbraith v. Oliver*, 3 Pittsburgh Rep. (Pa.) 79.

³ *Tipping v. St. Helen Smelting Co.*, 4 B. & S. 608; 116 E. C. L. 607; *Tenant v. Hamilton*, 7 Clark & Fin. 122; *Salvin v. North Brancepeth Coal Co.* 31 L. T. (N. S.) 154.

⁴ *Catlin v. Valentine*, 9 Paige's Ch. (N. Y.) 575; *Pottstown Gas Co. v. Murphy*, 39 Penn. St. 392.

⁵ *Com. v. Mann*, 4 Gray (Mass.), 213; *Cooper v. No. British R. R. Co.*, 36 Jur. 169; *Russell v. Popham*, 3 N. Y. Leg. Obs. 272.

⁶ *Cooper v. Randall*, 53 Ill. 54.

⁷ *Saville v. Killner*, 26 L. T. (N. S.) 277.

⁸ *Walter v. Selfe*, 4 Eng. Law & Eq. 20; *Huckenstein's Appeal*, 70 Penn. St. 102, 10 Am. Rep. 669; *Tipping v. St. Helen Smelting Co.*, 116 E. C. L. 608 4 B. & S. 608; *Rhodes v. Dunbar*, 58 Penn. St. 275.

reasonable manner, so as to inflict injury upon another unnecessarily.¹

SEC. 431. It becomes important, therefore, to ascertain as nearly as possible, from the decided cases, what degree of impurity imparted to the atmosphere by one in the use of his property constitutes a nuisance. It may as well be stated here, that no precise test can be given that is applicable to all cases, but that the question of nuisance is one of *fact*, and must be determined by the jury from the circumstances of each case.² Where the injury complained of is one arising to the *property* of the party seeking redress therefor, from smoke or noxious vapors, the injury must be tangible,³ such as is perceptible to the senses,⁴ or, to state the proposition somewhat more broadly, such an injury thereto as is visible and apparent to the eye of an ordinary person, and in no wise dependent upon scientific tests or microscopic investigations to discover.⁵ The law only deals with *real, substantial* injuries, and such as arise from a wrongful use of property, and will not lend its aid to check one engaged in a lawful pursuit simply because his neighbor is annoyed, or even damaged thereby, unless the use complained of is both in violation of that neighbor's right, and unreasonable.⁶

If the injury complained of is to the enjoyment of property, it must be such as would render the occupancy of the premises physically uncomfortable, to a person of ordinary sensibilities, for any of the purposes to which the owner may choose to devote it.⁷ It matters not whether the enjoyment impaired is of a dwelling-house,⁸ a store,⁹ a shop,¹⁰ a studio,¹¹ a church,¹² a play

¹ Embrey v. Owen, 4 Eng. Law & Eq. 476, 7.

² Burnham v. Hotchkiss, 14 Conn. 318; House v. Metcalf, 27 id. 639; People v. Davidson, 30 Cal. 379; Requa v. Los Angeles, 45 id. 55.

³ Duncan v. Hayes, 22 N. J. 26. Wesson v. Washburn Iron Co., 13 Allen (Mass.), 95.

⁴ Tipping v. St. Helen Smelting Co., 116 E. C. L. 603.

⁵ Salvin v. The North Brancepeth Coal Co., 31 Law T. (N. S.) 154.

⁶ Crump v. Lambert, 3 L. R. Eq. Cas. 409; Citizens' Gas-light Co. v. Cleveland, 20 N. J. 209; Ross v. Butler, 4 C. E. Green (N. J.), 294; Salvin v. North Brancepeth Coal Co., 31 L. T.

(N. S.) 154; Bamford v. Turnley, 31 L. J. (Q. B.) 286; Cavey v. Ledbetter, 13 C. B. (N. S.) 470; Adams v. Michael, 38 Md. 234; State v. Koster, 35 Iowa, 221.

⁷ Higingbotham v. Steam Packet Co., 8 C. B. 337.

⁸ Walter v. Selfe, 4 Eng. Law & Eq. 20; Ruff v. Phillips, 50 Ga. 130.

⁹ Sampson v. Smith, 8 Sim. 272.

¹⁰ Robbin's Case, 1 Lily's Register, tit. *Nuisance*.

¹¹ Johnson v. Constable, 3 D. (Sc.) 1263; Arnot v. Brown, 1 Stuart (Sc.), 694.

¹² Gullick v. Tremlett, 20 Weekly L. R. 358.

¹³ First Presbyterian Church v. R. R. Co., 15 Barb. (N. Y. S. C.) 79.

ground,¹ or a garden or farm;² it is enough, if the result of the business or act complained of, contaminates the atmosphere to such an extent as to impair the enjoyment of property for whatever purpose the owner may see fit to use it.³

In *Galbraith v. Oliver*, 3 Pittsburgh (Penn.), 79, which was an action to restrain the defendants from using a steam engine in the propulsion of a flouring mill in the vicinity of the plaintiff's premises, JOHNSON, J., in a very elaborate and able opinion, commendable for the common sense and straightforward manner in which he deals with the problem at issue, in giving the test by which to determine the question of nuisance from such uses of property, says: "The difficulty consists in the application of the rules in a manner consistent with the rights of all. How much atmosphere has a man a right to have preserved in its natural purity for his use? Theoretically, the maxim is, "*cujus est solum, ejus est usque ad coelum*." Doubtless, his right to pure air is co-extensive with his freehold, yet his remedy by action either at law or in equity would be restricted to the redress of grievances, affecting directly and injuriously either his person or property. Thus, a useful manufactory was restrained because it emitted an effluvia destructive to the vegetation of the plaintiff's land.⁴

Some occupations and manufactories necessarily corrupt the atmosphere. Several trades, and even a pig-pen have been judicially declared nuisances *per se* within the limits of Philadelphia city. Others are declared so when, from their location, they interfere with the health or comfort of their neighbors.

These are private nuisances, abatable only by injunction at the complaint of private individuals.

Practically, a man can only maintain his right to so much circumambient air as is necessary for his personal health and comfort and the safety of his property.

It is often found very difficult to adjust the rights of adjacent owners and occupiers so as to give to each his own without jost-

¹ *Galbraith v. Oliver*, 3 Pitts. (Penn.) 79. No. Brancepeth Coal Co., 31 L. T. (N. S.) 154. *Bankhardt v. Houghton*, 27

² *Saville v. Killner*, 26 L. T. (N. S.) 277. Beavan, 425; *Poynton v. Gill*, 2 Rolle's

³ *Roberts v. Clarke*, 17 id. 384. Abr. 149; *Campbell v. Seamen*, 2 N. Y. S. C. (Parsons' Ed.) 321; *Saville v. Killner*, 26 L. T. (N. S.) 277; *Davis v. Grenfell*, 6 C. & P. 624.

⁴ *Tipping v. St. Helen Smelting Co.*, 1 L. R. Ch. App. 66; *Tennant v. Hamilton*, 7 Cl. & Finney, 123; *Slavin v.*

ing the other. Each has a right to occupy his own territory as he thinks best — to build what he pleases from a palace to a pig-sty.

No occupation is more legitimate, and no erection more careful, than that of a flouring mill. There can be no denial of the owner's right to build one and to run it by steam. So of any other manufacturing establishment. They may not be agreeable to his next neighbor. He is not bound to consult the taste, pleasure or preference of others; but he *is* bound to respect his neighbor's rights. The inflexible rule, *sic utere tuo ut alienum non lædas*, stares him in the face. True, something must be conceded to the manufacturer. His business is legitimate. The public have an interest in his productions.

The adjacent palace owner must forego his personal predilections for more fashionable neighbors, or agreeable occupations in his vicinage.

Things merely disagreeable, must be borne; but none of his elementary rights must be invaded. However offensive to his sight or taste the pig-sty or bone-boiling may be, it is *damnum absque injuria*. He is remediless. He must avoid looking that way.

But whenever his enjoyment to the right of good health, pure air and water, and to exemption from unreasonable noises at unreasonable hours is interrupted, then the law will hear and heed the complaint.

While mills and manufactories are legal and necessary, it is neither legal nor necessary that they be so located as to interfere with the rights of others in the enjoyment of their possessions. When, therefore, they create noises that prevent sleep, or taint the atmosphere with vapors prejudicial to health or nauseous to the smell, or fill it with a smudge that depreciates its use for every purpose, they trench on the rights of persons affected thereby.

Just here, is where the line must be drawn. At this point they become nuisances. The difficulty exists in the location of this line. When once ascertained, no lawyer doubts as to the rights and remedies of the parties. Both private and public interests may suffer. Such are the necessities of our social organization.

The rights of private property must be protected. This principle lies at the foundation of our civil institutions.

As to what constitutes a private nuisance, we have perhaps as good a definition as elsewhere in Adams' Equity, p. 210: "A private nuisance is an act done, unaccompanied by an act of trespass, which causes a substantial prejudice to the hereditaments, corporeal or incorporeal, of another;" for the remedy of which, as is stated in the next page, "there is a jurisdiction in equity to enjoin, if the fact of nuisance be admitted or established, whenever the nature of the injury is such that it cannot be adequately compensated by damages or will occasion a constantly recurring grievance."

In *Catlin v. Valentine*, 9 Paige, 675, Chancellor WALLWORTH says: "To constitute a nuisance it is not necessary that the noxious trade or business should endanger the health of the neighborhood. It is sufficient if it produces that which is offensive to the senses, and which renders the enjoyment of life or property uncomfortable." See, also, *Brady v. Weeks*, 3 Barb. 157, for reiteration of the same sentiment.

These rulings *in hæc verba* have been adopted as the law of the State, and are made the foundation for relief in equity by injunction. *Smith v. Cummings*, 2 Pars. 92; Leg. Int., Vol. 23, No. 43; *Dennis v. Eckhardt*, 3 Grant, 302, in which case THOMPSON, J., remarks: "A chancellor does not wait till noisome trades and unwholesome gases kill somebody, before he proceeds to restrain." "The loss of health and sleep, the enjoyment of quiet and repose, and the comforts of home, cannot be restored or compensated in money," and are therefore proper subjects for protection by injunction.

Other modern decisions in several of the States have adopted the rule that to create a nuisance it is not necessary the smells produced should be unwholesome, but only that they render the enjoyment of the plaintiff's property uncomfortable and unpleasant by making the atmosphere nauseous and offensive.

Some discomforts must be endured as compensation for the conveniences of city life. No public interest deserves protection and encouragement more than manufacturing industry. I yield to none in my friendship for productive labor, or in my contempt

for the snobbery that undervalues it. When the world gets too populous to accommodate all, it will be time enough to consider the question of preference. At present the law awards to all equally, their rights of person and property. Yielding to this rule of equal rights, I cannot find authority in the law for saying that a thing which fills the atmosphere that others have a right to live in with offensive smoke and odors, stifles the breath, produces nausea and headache, drives children from their playgrounds and men from their gardens, prevents the drying of clothes and ventilation of houses, darkens the sunlight, and converts pleasant residences into prison-houses in dog-days, and defiles carpets, curtains and dinner plates with deposits of soot and dirt, is not a nuisance, even though such results are only occasional."

SEC. 432. The law does not meddle with a *reasonable* use of property. It is only when the use is unreasonable, in view of the rights of others, that it gives a remedy. Therefore a person may follow any trade, or make any use of property, not a nuisance *per se*, that produces no unreasonable or extraordinary impregnation of the atmosphere with smoke or other impurities.¹ But while every person may use his premises according to the dictates of his own taste, without reference to the taste or necessities even of his neighbor, so long as such use is lawful, yet, when he steps outside his legal rights and does that which is injurious to others, his acts create an actionable nuisance.² He may erect buildings with chimneys, and may build fires therein in a proper manner, because these are among the necessary incidents to such property,³ but he has no right to burn fuel in the making of such fires that develops dense masses of smoke, to the injury of his neighbor,⁴ nor to build his chimneys so as to send the smoke into his neighbor's house.⁵ If his neighbor's house is high and

¹ *Ross v. Butler*, 4 C. E. Green (N. J.), 294.

² *Saville v. Killner*, 26 L. T. (N. S.) 277; *Pickard v. Collins*, 23 Barb. (N. Y. S. C.) 444; *Barnes v. Hathorn*, 54 Me. 272; *Curtis v. Winslow*, 36 Vt. 690.

³ *Embrey v. Owen*, 4 Eng. Law & Eq. 478.

⁴ *Richards v. Phenix Iron Co.*, 7 Am. Law Reg. (N. S.) 536; 7 P. F. Smith (Penn.), 105; *Ross v. Butler*, 19 N. J.

274; *Duncan v. Hayes*, 22 id. 26; *Cartwright v. Gray*, 12 Grant's Ch. (Ont.) 400; *Galbraith v. Oliver*, 3 Pitts. (Penn.) 78; *Rhodes v. Dunbar*, 58 Penn. St. 275; *Campbell v. Seamen*, 3 N. Y. (Parsons' Ed.)

⁵ *Duncan v. Hayes*, 22 N. J. 26; *Sampson v. Smith*, 8 Simons, 272; 11 Condensed Eng. Ch. Rep. 433; *Bartholomew v. Whitney*, 21 Conn. 213; *Whalen v. Keith*, 35 Mo. 87; *Lang v. Muirhead*, 2 S. 73; N. E. 67.

his own low, this does not absolve him from raising his chimneys to such a height as to prevent the smoke from entering his neighbor's house.¹ In *Lord Colchester v. Ellis*, the defendant, who was the owner of a building in Spring Garden, London, erected a chimney in his stable for the purpose of having a fire in his saddle room. The chimney was much lower than the surrounding buildings, and when a fire was built the smoke escaping through the chimney entered the plaintiff's dwelling, some fifty yards distant, and injured the plaintiff's furniture by covering the same with soot and discoloring it. The smoke was also a great annoyance to the plaintiff and his family. It was held that this was an actionable nuisance, and that if the plaintiff would have a fire in his stable he must construct his chimney so as not to injure his neighbor's property or impair its comfortable enjoyment.

The rule in reference to all such matters is, that where one makes an erection upon his premises which *may* become a nuisance if not properly constructed, he is bound, at his peril, to see to it that the erection is so made as not to become so.²

SEC. 433. In *Sampson v. Smith*, 8 Sim. 272, the plaintiff was in possession of a dwelling-house, shop and premises, No. 2 Prince's street, Leicester Square. He had valuable furniture in his dwelling-house, and also a valuable stock of clothing, cloths and other goods in his shop, which he kept there exposed for sale. His dwelling-house and shop were on the east side of the street. On the opposite side of the street the defendants had a manufactory in which they carried on the business of engineers. For their own convenience they put into this building a steam engine and operated their machinery thereby from December to March without any perceptible injury to the plaintiff. They did not erect a new chimney for the engine, but made use of an old one. The top of the chimney was not as high as the roofs of the other buildings in the vicinity. Upon the top of the chimney was placed a metallic pipe about five feet high, but which was in point of fact three feet lower than the tops of the surrounding chimneys.

¹ *Lord Colchester v. Ellis*, 2 Starkie's Ev. 538; *Rich v. Basterfield*, 2 Carr. & K. 257; 11 Jur. 696; 16 L. J. (C. P.) 273; *Sampson v. Smith*, 8 Sim. 272; *Lang*

v. Muirhead, 2 S. (Sc.) 73; *Prescott's Case*, 1 City Hall Rec. (N. Y.) 161.

² *Cook v. Montagu*, 26 L. T. (N. S.) 471; *Marshall v. Cohen*, 44 Ga. 489; *Duncan v. Hayes*, 22 N. J. 26.

Dense volumes of smoke issued from this chimney, and the black soot and cinders descended in such dense bodies into the street, and into the shop and dwelling-house of the plaintiff, as to seriously injure the goods in his store, the furniture in his dwelling, and materially impaired the comfortable enjoyment of the dwelling. The court held that the use of the steam engine in that manner and with such results was a nuisance, and that the plaintiff was entitled to maintain a bill to enjoin the same, because of the special injury to him, although the nuisance might at the same time be a public nuisance.

SEC. 434. In *Whitney v. Bartholomew*, 21 Conn. 213, the defendant erected a carriage factory and blacksmith shop in the immediate vicinity of the plaintiff's dwelling-house and carried on the business of blacksmithing therein. It appeared that, owing to the location of the defendant's shop the cinders, ashes and smoke issuing from the chimneys of the defendant's shop were thrown in large quantities upon the plaintiff's house and land, so that the water in her well became colored and unfit for use. That when the wind blew in a certain direction from the defendant's premises it was impossible for the plaintiff's tenants to dry their clothes, without having them soiled and injured by the smoke, ashes and cinders thrown upon them from the defendant's shop, and when their windows were open the house would be filled with smoke and ashes proceeding from the defendant's shop. It also appeared that in consequence of these annoyances, the plaintiff's tenants had left the house, and that it had stood empty a year, by reason of which she had lost the rent thereon during that period. The jury, under the instructions of the court having returned a verdict for the plaintiff, the judgment was sustained upon an appeal, CHURCH, Ch. J., saying: "The trade or occupation of carriage making or of a blacksmith, is a lawful and useful one; and a shop or building erected for its exercise is not a nuisance *per se*. Nor was there any complaint in this case, that the defendant's business was not conducted in the usual way; but it was that the shop was erected, and the business carried on in an *improper place*. If this was so, that was a fault, or a want of proper care in the defendant, which should subject him, to the

damages that flowed from his act if it resulted in an essential injury to the plaintiff, and this question submitted to the jury was found for the plaintiff."

SEC. 435. In *Rhodes v. Dunbar*, 58 Penn. St. 275, 7 Am. Law Reg. (N. S.) 412, the plaintiff sought to restrain the defendant from the erection of a planing mill, upon the site of an old mill of the same character that had been burned, in the vicinity of the plaintiff's residence, in the city of Philadelphia. Among other grounds upon which the claim for an injunction was rested, it was insisted that the business would be a nuisance by reason of the soot, smoke and cinders discharged from the mill, by the use of pine chips and shavings for fuel in heating the engine. THOMPSON, Ch. J., in commenting upon this branch of the case says: "The complaint in reference to the old mill was, on account mainly of the fuel, chips, shavings and saw-dust used; and that is the foundation of the complaint against the contemplated re-erection. *If no other species of fuel would answer the purpose or could be used*, I grant there would be more in this point. But this is not pretended. If, therefore, when the mill shall be put in operation, and by its use it becomes a nuisance *from this cause*, the remedy is well known. Equity will enjoin against the use of such fuel, and the mischief will at once be cured."

SEC. 436. Thus it will be seen that even in the ordinary uses of buildings, the owners and occupants are bound not only to see to it that their chimneys are so arranged as to carry off the smoke developed therein, but are also bound to use such fuel as will produce the least obnoxious smoke.¹ If one building is five stories high, and the other only one story, this does not warrant the owner of the low building in building a low chimney so as to send the smoke into the higher building? Nor is it any defense that the owner of the high building has opened windows upon the side of his building when there was no neces-

¹ *Campbell v. Seamen*, 2 N. Y. Sup. Ct. (Parsons' Ed.) 231; *Ross v. Butler*, 4 C. E. Green (N. J.), 294; *Norris v. Barnes, L. R.*, 7 Q. B. 537; *Cartwright v. Gray*, 12 Grant's Ch. (Ont.) 400. *Duncan v. Hayes*, 22 N. J. 26; *Whitney v. Bartholomew*, 21 Conn. 213; *Lang v. Muirhead*, 2 S. (Scotch), 73; *Rich v. Basterfield*, 2 C. & K. 257; *Prescott's Case*, 1 City Hall Rec. (N. Y.)

² *Sampson v. Smith*, 8 Sim. 272; 161.

sity therefor, and that except for the windows the smoke would be no annoyance to him, for no man is bound to consult the taste, convenience or advantage of his neighbor in the use of his own property, or the erections he makes thereon, so long as he keeps within the purview of his strict legal rights, and if he sees fit to open windows, or doors, even on the side of his house, whether they are necessary or not, the adjoining owner is bound to respect his right to do so, and must see to it, at his peril, that he does not so use his own property as to create a nuisance to the other.¹

SEC. 437. In *Saville v. Killner* the plaintiff was the owner of a lot of land adjoining the defendant's, which he had at great expense laid out into villa lots, and upon a part of which he had erected several fine residences which were occupied by tenants. The defendant had glass works with seven furnaces in full operation upon his lot, and the smoke emitted from the furnaces found its way over the plaintiff's premises in large volumes, entering the houses and making their occupancy very uncomfortable. The smoke, as was proved on the trial, produced a bad taste in the mouths of those who breathed it; and as a result the tenants threatened to leave, and the plaintiff was not only thereby prevented from renting the houses then occupied, but was also prevented from selling lots that had been prepared for that purpose. It was insisted upon the trial, among other things, that the plaintiff's premises would not be seriously affected by the smoke from the works if he erected *cottages* instead of tall buildings, and that, as it was possible for the plaintiff to occupy his premises in a manner that was consistent with the use by the defendant, of his premises, that he was bound to conform his use of his lots to the use by the defendants of their premises. Upon this point the court said: "It was suggested that, if the plaintiff could not build houses, he might build cottages. That is no answer, because it is for the plaintiff himself to determine what to put on his land, and if he has a right to the air, it is his, as much as the land, and no one can prescribe for it." In reference

¹ *Saville v. Killner*, 26 L. T. (N. S.) *Pickard v. Collins*, 23 Barb. (N. Y. S. 277; *Barnes v. Hathorn*, 54 Me. 272; C.) 444.

to the unpalatable character of the smoke, the court said: "If smoke produces an unpleasant taste in the mouths of persons passing the works, why are they not to be protected? It is only necessary to establish the fact that it is hurtful to life, or detrimental to its comfortable enjoyment."

SEC. 438. The law applicable to this class of nuisance, as well as to the ordinary uses of property, is admirably given in *Cartwright v. Gray*, 12 Grant's Ch. (Ont.) 400. It appeared that in December, 1864, the plaintiffs sold to the defendant a lot of ground in the city of Kingston, near the residence of the plaintiff Richard Cartwright, and near the two other houses of which the two plaintiffs were joint owners. The defendant, the next year after his purchase of the premises, erected a carpenter shop thereon, and put in a planing machine and circular saw driven by steam. The plaintiffs allege that the smoke, noise and sparks produced in working the engine were nuisances by reason of the discomfort produced thereby to themselves and families in the occupancy of their dwellings, and because of the actual injury to property thereby. It appeared that the nuisance arose principally from the fuel employed in running the engine and from a failure on the part of the defendant to employ the usual and best appliances for discharging the smoke. The smoke arising from the works was proved to be pungent and disagreeable, and as soiling linen hung out to dry. MOWAT, V. C., in delivering the opinion of the court, laid down the law as applicable to this class of nuisances, thus: "I think it proved that, from the prevalent wind being in the direction in which the plaintiff Richard Cartwright's residence lies from the defendant's shop, the smoke goes generally in that direction; that from this cause, as well as the height of the house and other local circumstances, the occupants are liable to suffer more from the smoke than the occupants of the neighboring houses; and, comparing the testimony on both sides, I have no doubt that the character of the nuisance, as affecting the plaintiff's residence, is not overstated by one of the witnesses, who says, 'The smoke is a heavy black smoke. It has been heavy at times in the yard of Mr. Cartwright's house, such that I could not see or breathe as freely as when there is no smoke. The

smoke was so thick that if the windows had not been down, it would have injured fine curtains, or wall paper or the like. I have sometimes heard Mrs. Cartwright order the windows to be shut in consequence of the smoke. I saw the smoke two or three times a week, and sometimes every day of the week. It did not annoy me. It did not hurt the yard. It was like a heavy fog.' This witness, a servant of Mr. Cartwright's, says the smoke did not annoy him, though he also says it interfered with his seeing and breathing, but I think I must hold that such a degree of smoke as he and others describe is quite sufficient to justify the testimony of another witness, who, speaking from his own observation, pronounced it 'certainly prejudicial to comfortable enjoyment so far as respects the plaintiff's house.' It is not alleged that the defendant has adopted any of the well-known contrivances for consuming or preventing smoke. Now, according to the settled doctrine of the courts, as stated by Vice-Chancellor (now Lord Justice) KNIGHT BRUCE, in *Walter v. Selfe*,¹ the plaintiff is clearly entitled to 'an untainted and unpolluted stream of air for the necessary supply and reasonable use of himself and his family there; or, in other words, to have there, for the ordinary purposes of breath and life, an unpolluted and untainted atmosphere, meaning by "untainted" and "unpolluted" not necessarily as fresh, free and pure as at the time of building the plaintiff's house, the atmosphere then was, but air not rendered to an important degree less compatible, or at least not rendered incompatible, with the physical comfort of human existence; a phrase to be understood, of course, with reference to the climate and habits of England.' I think that the inconvenience made out by the plaintiff in the present case is, in the language of the learned judge, 'more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort, physically, of human existence, not merely according to plain, sober and simple notions among the English people (a).' The statement of the law which I have thus quoted accords entirely with what was laid down in the late case of *St. Helen's Smelting Co. v. Tipping*,² which

¹ *Walter v. Selfe*, 4 Eng. Law & Eq. 15.

² *Tipping v. St. Helen Smelting Co.* 4 B. & L. 508.

went up to the house of lords. 'A man may not use his own property so as to injure his neighbor. When he sends on the property of his neighbor noxious smells, smokes, etc., then he is not doing an act on his own property only, but he is doing an act on his neighbor's property also, because every man, by common law, has a right to the pure air, and to have no noxious smells or smoke sent on his land, unless by a period of time a man has by what is called a prescriptive right obtained the power of throwing a burden on his neighbor's property. When great works have been created and carried on, works which are the means of developing the national wealth, you must not stand on extreme rights. Business could not go on if that were so. Every thing must be looked at from a reasonable point of view; therefore the law does not regard as trifling and small inconveniences, but only regards sensible inconveniences — injuries which sensibly diminish the comfort, enjoyment or value of the property which is affected. This was the language of Mr. Justice MELLOR, and was held to be correct by the other judges in answer to a question submitted to them in the House of Lords, and by the noble lords who took part in disposing of the appeal. Lord Chancellor WESTBURY said in his judgment: "If a man lives in a town, of necessity he must submit himself to the consequence of those obligations of trade which may be carried on in his immediate locality which are actually necessary for trade and commerce, also for the enjoyment of property, and for the benefit of the inhabitants of the town, and of the public at large." Here, the fault of the defendant's case is, it does not appear that the sending these clouds of smoke into his neighbor's houses is necessary at all, or that the defendant has taken any means to avoid it. Lord CRANWORTH mentioned his charge, in a case he had tried while a Baron of the Exchequer, as an accurate statement of the law. The action, his lordship said, "was for smoke in the town of Shields. It was proved incontestibly that smoke did come, and in some degree interfered with a certain person, but I said, 'you must look at it, not with a view to the question whether, abstractly, that quantity of smoke was a nuisance, but whether it was a nuisance to the person living in the town of Shields;' because if it only added in an infinitesimal

degree to the quantity of the smoke, I thought that the state of the town rendered it altogether impossible to call it a nuisance." This was a case at law, but the rule in equity is the same. *Beardmore v. Treadwell*,¹ was a bill to restrain a nuisance; and in the course of his judgment the Vice-Chancellor observed: "Where a man is injuring his neighbor to a very material extent in a way not absolutely necessary and unavoidable in order to enjoyment of his own fair private right, this court is always disposed to interfere." The learned judge afterward quotes with approbation the following language of Mr. Justice WILLIS: "The common-law right which every proprietor of a dwelling-house has to have the air uncontaminated and unpolluted, is subject to this qualification; that necessities may answer for the interference with that right, *pro bono publico*, to this extent, that such interference being in respect of a matter essential to the business of life, and being conducted in a reasonable and proper manner, and in a reasonable and proper place."² The Vice-Chancellor adds: "If there be another place where it may be conducted without injurious consequences, or with less injury according to law, the right of a person complaining to have his air uncontaminated and unpolluted, would be clear."³ These and other authorities show that, while the plaintiffs cannot insist upon the complete immunity from all interference which they might have in the country, the defendant cannot, on that ground, justify throwing into the air, in and around the plaintiff's houses, any impurity which there are known means of guarding against. It was proved, on behalf of the defendant, that there are other establishments of various kinds in the same part of the city, from whose works more smoke is sent forth than from the defendant's mill; and, on the other hand the plaintiffs have given evidence that the smoke from these establishments, though they have been many years in operation, never reached the plaintiffs' houses so as to cause any inconvenience to their occupants. I have no doubt it is from

¹ *Beardmore v. Treadwell*, 31 L. J. (N. S.) 286.

² *Barnes v. Hathorn*, 54 Me. 272; *Pickard v. Collins*, 23 Barb. (N. Y. S. C.) 444; *Mahan v. Brown*, 13 Wend. (N. Y.) 261.

³ *Crump v. Lambert*, 3 L. R. (Eq. Ca.) 409; *Rhodes v. Dunbar*, 58 Penn. St. 275; *Ross v. Butler*, 4 C. E. Green (N. J.), 294; *Duncan v. Hayes*, 22 N. J.

the defendant's engine that the smoke now complained of comes; but, had it been partly or chiefly from the others, the fact would have been no justification of additional injury on the part of the defendant.

The learned counsel for the defendant argued that there could be no injunction, except at the suit of the occupier, and that the other plaintiff was improperly made a plaintiff in respect of the other plaintiff's residence, and that no relief could be had in respect of a nuisance of this kind affecting the houses they have rented to others. But if the defendant is restrained as respects Mr. Richard Cartwright's residence, this renders the question immaterial as to the other houses, for the discontinuance of the nuisance, as to the former, would involve its discontinuance as to the latter; and if the one plaintiff is improperly joined, this does not, under the present practice, disentitle the other to relief. I do not find, however, that the rule at law, which forbids an action for a nuisance like that here except by the occupier, is a rule of this court. As to the sparks, the defendant has given evidence to show that a screen which he has put on the top of the pipe since the commencement of the suit, has removed this cause of complaint. It is sworn that the screen is among the closest made, and closer than one generally made for this purpose. Sparks do still pass through, but not to the same extent as before, and there is no evidence that it would be possible by any contrivance to prevent them to a greater degree than the defendant has now done. No case was cited which would justify me in holding it a nuisance to make use of machinery driven by steam, in this part of the town; and if a certain amount of danger to the houses in the neighborhood is the necessary consequence, it seems to be a consequence which as owners of town property they must accept subject to any right they may happen to have to damages at law, in case of actual loss. The case is not the same as a corning-house to powder-mills, as in *Crowder v. Tinkler*, which was cited by the learned counsel for the plaintiff in support of this branch of his case. The claim of the bill founded on the noise made by the engine was not much pressed. The noise is less since the completion of the defendant's building than it was previously; and,

on the whole, evidence does not appear to be such now as to interfere sensibly with the comfort of persons in average health living in the plaintiffs' house. My opinion on the whole case is that the defendant has a right to use steam for propelling his machinery, but is bound to employ such reasonable precautions in the use of it as may prevent unnecessary danger to his neighbor's property from sparks, and unnecessary annoyance or injury to them from the noise or smoke; that though he seems, since the bill was filed, to have performed this duty as respects these sparks and noise, he has done nothing in respect to the smoke; and that the plaintiff's complaint in reference thereto is well founded. The decree will therefore require the defendant to desist from using his steam engine in such a manner as to occasion damage or annoyance to the plaintiffs, or either of them, as owning or occupying the houses mentioned in the bill."

SEC. 439. Smoke alone may constitute a nuisance, but in order to have that effect, it must either produce a *tangible* injury to property, as by the discoloration of buildings,¹ injury to vegetation,² the discoloration of furniture,³ the deposit of cinders thereon,⁴ the discoloration of clothes hung up to dry,⁵ the discoloration of goods of any kind,⁶ and in fact, *any tangible* injury to property, real or personal, *or* it must sensibly impair its comfortable enjoyment.⁷ The precise degree of discomfort that must

¹ *Wesson v. Washburne Iron Co.*, 13 Allen (Mass.), 95; *Cooper v. North British R. R. Co.*, 36 Jur. 169, 2 Macph. 117.

² *Slavin v. North Brancepeth Coal Co.*, 31 L. T. (N. S.) 154.

³ *Lord Colchester v. Ellis, Cor.*; *ABBOTT, J.*, 2 Starkie's Ev. 567.

⁴ *Wesson v. Washburne Iron Co.*, 13 Allen (Mass.), 95.

⁵ *Hutchins v. Smith*, 63 Barb. (N. Y. S. C.) 252; *Cartwright v. Gray*, 12 Grant's Ch. Ca. (Ont.) 400.

⁶ *Sampson v. Smith*, 8 Sim. 272.

⁷ *Hyatt v. Myers*, 71 N. C. 271, smoke from planing-mill; *Walter v. Selfe*, 4 Eng. Law & Eq. 15, brick-kiln near dwelling; *Hutchins v. Smith*, 63 Barb. (N. Y. S. C.) 252, lime-kiln near dwelling; *Reg. v. Waterhouse*, 7 Q. B. 545, 26 L. T. (N. S.) 761, black smoke from dye-works in populous locality;

Barnes v. Ackroyd, 26 L. T. (N. S.) 692, black smoke; *Bareham v. Hall*, 21 L. T. (N. S.) 116, brick-kiln near dwelling; *Higgins v. Guardians of Herndon Union*, 22 id. 753, smoke from salt-works near dwelling; *Roberts v. Clark*, 17 id. 384; smoke from brick-kiln near villa; *Rhett v. Davis*, 5 S. (Sc.) 217, smoke from cook ovens; *Luscombe v. Steere*, 17 L. T. (N. S.) 229, smoke from brick-kiln; *Crump v. Lambert*, 3 L. R. (Eq. Ca.) 409, 17 L. T. (N. S.) 133, blast furnace near dwelling emitting dense volumes of smoke; *Beardmore v. Treadwell*, 7 L. T. (N. S.) 207; 3 Giff. 783, brick-kiln near dwelling; *Bamford v. Turnley*, 3 B. & S. 61, 6 L. T. (N. S.) 721, brick-kiln near dwelling; *Norris v. Barnes*, 25 L. T. (N. S.) 622, bichrome works near dwelling emitting dense volumes of smoke; *Ward v. Lang*, 35 Jur. 408, chemical works

be produced to constitute a business a nuisance that emits smoke near a dwelling cannot be definitely stated. No fixed rule can be given that will be applicable to every given case. That is necessarily a question of fact for the jury to find.¹ The rule is, that the comfortable enjoyment of the premises must be *sensibly* diminished,² either by actual tangible injury to property itself,³ or by the promotion of such *physical* discomfort, as detracts sensibly, from the ordinary enjoyment of life.⁴ The fact that the business is productive of inconvenience to others, on the one hand, or shocks the tastes of fastidious people on the other;⁵ that it diminishes the value of property in the vicinity, or prevents it from being let at such high rental as it otherwise would be⁶ is not the test, for every person has a right to do with his

emitting smoke in large volumes; *Donald v. Humphrey*, 14 F. (Sc.) 1206, brick-kiln near dwelling; *Barlow v. Kinnear*, 2 Kerr (N. B.), 94, steam mill near dwelling; *Cartwright v. Gray*, 12 Grant's Ch. Cases (Ont.), 500, smoke from steam engine in planing mill; *Pollock v. Lester*, 11 Hare, 269, brick-kiln near lunatic asylum; *Cavey v. Leabitter*, 13 C. B. (N. S.) 470, brick-kiln near dwelling; *Fusileer v. Spaulding*, 2 La. 273; brick-kiln near dwelling; *Barwell v. Brooks*, 1 L. T. (N. S.) 75, 454, brick-kiln near dwelling; *Ross v. Butler*, 4 C. E. Green (N. J.), 294, pottery works near dwelling; *Ottawa Gas Co. v. Thompson*, 29 Ill. 598, smoke and odor from gas works; *Duncan v. Hayes*, 22 N. J. 26, steam planing-mill near dwelling; *Shuttleworth v. Cocker*, 9 Dow. P. C. 88, smoke and dust from defendant's mill; *Wesson v. Washburn Iron Co.*, 13 Allen (Mass.), 95, iron works near an inn emitting smoke and cinders; *Rhodes v. Dunbar*, 58 Penn. St. 275, steam planing-mill near dwelling; *Norcross v. Thoms*, 51 Me. 503, blacksmith shop near house; *Galbraith v. Oliver*, 3 Pittsburgh Rep. 79, steam planing-mill; *Richards v. Phoenix Iron Co.*, 7 P. F. Smith (Penn.), 105, iron works near dwelling; *Thiebault v. Conover*, 11 Fla. 143, steam mill emitting smoke and cinders; *Rich v. Basterfield*, 2 O. & K. 257, smoke from chimney of a dwelling-house; *Whalen v. Keith*, 35 Mo. 87, smoke-stack near dwelling; *Simpson v. Smith*, 8 Sim. 272, steam engine near dwelling and store; *Monteath v. Lang*, 37 Jur. 265, 3 Macph. 726, black smoke from furnace;

Lang v. Muirhead, 2 S. (Sc.) 73, chimney near plaintiff's windows; *Sampson v. Savage*, 37 Eng. Law & Eq. 374; smoke from chimneys of workshops; *Bennett v. Thompson*, 37 id. 51, smoke from chimneys of workshops; *Regina v. Barry*, 9 Law Rep. (Am.) 124; *PATTESON, J.*, in *Queen v. Murspratt Alkali Works*, cited in *Regina v. Barry* (supra); *Citizens' Gas Light Co. v. Cleveland*, 5 C. E. Green (N. J.), 201, gas words; *Hudson v. Madison*, 12 Sim. 417; *Seiple v. London & Birmingham R. R. Co.*, 1 Railway Ca. 120; *Cleane v. Mahany*, 9 W. R. 881, brick-kiln; *Aldred's Case*, 9 Coke, 102; *Jones v. Powell*, Palm. 539, glass-house; *Gullick v. Tremlett*, 20 W. R. 358, smoke from forge; *Butler v. Rogers*, 1 Stockt. (N. J.) 487, blacksmith shop; *Robin's Case*, cited in *Jones v. Powell*, Palm. 536, injury to goods by smoke from beer-house; *Swaine v. Great Northern R. R. Co.*, 33 L. J. (Ch.) 390; *Adams v. Michael*, 38 Md. 234.

The above are cases in which smoke alone has been held to be a nuisance, when producing actual, tangible injury to property, or interfering with its ordinary enjoyment.

¹ *Pilcher v. Hart*, 1 *Humphrey* (Tenn.), 524; *Burnham v. Hotchkiss*, 14 Conn. 318.

² *Regina v. Barry*, 9 L. R. (American, Boston) 124.

³ *Ross v. Butler*, 4 C. E. Green (N. J.), 294.

⁴ *Duncan v. Hayes*, 22 N. J. 26.

⁵ *Barnes v. Hathorn*, 54 Me. 274.

⁶ *Ross v. Butler*, 4 C. E. Green (N. J.) 294.

own property as he sees fit, so long as he does not invade the rights of his neighbor unreasonably, judged by the ordinary standards of life, according to the notions and habits of the people of ordinary sensibilities, and simple tastes.¹

The law strikes a medium line between the two extremes. On the one hand it does not recognize that impregnation of the atmosphere with foreign substances that is merely disagreeable to people of delicate sensibilities and fastidious tastes as unlawful,² nor, on the other hand, does it uphold a trade producing those results, because to persons of perverted sensibilities, no disagreeable effects are experienced, but³ regards all such occupations or uses of property as unwarrantably interfere with the comfortable enjoyment of property, by persons of ordinary sensibilities and tastes and habits of life, as a nuisance.⁴ Neither does the law refuse to interfere and give protection to a party because the injury is only occasional, and exists but a short time at occasional intervals.⁵ An unwarrantable use of property that interferes with the rights of another is a nuisance, and will be redressed as such both by courts of law and equity, if they exist only for a few moments each day.⁶ At law, the simple question is, whether a legal right has been invaded; if so, even though no actual damage has resulted, the law will import damage, to sustain the right,⁷ and in equity, if a legal right has been invaded, and a repetition of the injury is threatened, or is probable, the offender will be enjoined.⁸

SEC. 440. In *Crump v. Lambert*, 3 L. R. (Eq. Cas.) 407, the defendant erected in the vicinity of the plaintiff's dwelling an establishment for the manufacture of iron bedsteads, containing two blast furnaces, one of which was in constant operation, for the purpose of smelting iron, in which operation coke was burnt

¹ *Walter v. Selfe*, 4 Eng. Law & Eq. 15; *Cleveland v. Citizens Gas Light Co.*, 5 C. E. Green (N. J.), 201; *Cleve v. Mahany*, 9 W. R. 881; *Roberts v. Clark*, 17 L. T. (N. S.) 374; *Crump v. Lambert*, 3 L. R. Eq. Ca. 409.

² *Water v. Selfe*, 4 Eng. Law & Eq. 15; 4 DeG. & S. 325; 19 L. T. 308; *Cleveland v. Citizens Gas Light Co.*, 56 C. E. Green (N. J.), 201.

³ *Rhodes v. Dunbar*, 58 Penn. St. 275.

⁴ *Ross v. Butler*, 4 C. E. Green (N. J.), 294; *Hutchins v. Smith*, 63 Barb. (N. Y. Sup. Ct.) 252.

⁵ *Ross v. Butler*, ante.

⁶ *Attorney-General v. Sheffield Gas Co.*, 19 Eng. Law & Eq. 648.

⁷ *Ashby v. White*, 2 Ld. Raym. 1024.

⁸ *Sparhawk v. The Union Passenger Railway*, 4 P. F. Smith (Penn.), 404; *Butler v. Rogers*, 1 Stockt. (N. J.) 487.

and lime used as a flux. A large quantity of coal was also used in driving a steam engine, and at smiths' forges in the factory. The smoke and effluvia passed off through a chimney fifty feet in height, located about fifty-eight yards from the plaintiff's house. Large quantities of smoke issued from the chimneys and settled upon and around the plaintiff's house, and interfered with the comfortable enjoyment of life there. Upon the hearing before Lord ROMILLY, M. R., the defendant insisted that *smoke* alone, or *noise* alone, or *noxious vapors* alone, would not create a nuisance; but the court said: "With respect to the question of law, I consider it to be well settled by numerous decisions that smoke unaccompanied with noise or noxious vapors, that noise alone, that offensive vapors alone, although *not injurious to health*, may severally constitute a nuisance to the owner of adjoining or neighboring property; * * * and the rule upon the subject is the same, whether it be enforced by action at law or a bill in equity."

SEC. 441. The doctrine of this case has been adopted by the courts of this country, and it may be regarded as well settled that smoke alone, whether accompanied with cinders or not, is a nuisance whenever it is developed in sufficient *quantities* to interfere with the comfortable enjoyment, *physically*, of adjoining property.¹

SEC. 442. In *Hutchins v. Smith*, 63 Barb. (N. Y. S. C.) 252, the defendant erected two lime kilns across the road from the plaintiff's house and about 204 feet distant. The kilns were filled with limestone, and anthracite coal, and wood, and about fourteen tons of coal were employed in the process of burning the two kilns. During the early part of the burning a dense black smoke escaped from the kilns, more or less filled with gas and particles of dust, and when the wind blew from the north-

¹ *Ross v. Butler*, 4 C. E. Green (N. S. C.) 294; *Duncan v. Hayes*, 22 N. J. 26; *Cleveland v. Gas-light Co.*, 20 id. 209; *Hutchins v. Smith*, 63 Barb. (N. Y. S. C.) 252; *Attorney-General v. Stewart*, 20 N. J. 415; *Rhodes v. Dunbar*, 58 Penn. St. 275; *Richards v. Phenix Iron Co.*, 7 P. F. Smith (Penn.), 105; *St. Helen Smelting Co. v. Tipping*, 11 H. L. Cas. 642; *Walter v. Selfe*, 4 Eng. Law and Eq. 15; 4 De G. & Sm. 322; *Saville v. Killner*, 26 L. T. (N. S.) 277; *Washburn v. Wasson Iron Co.*, 13 Allen (Mass.), 95; *Galbraith v. Oliver*, 3 Pittsburgh Rep. (Penn.) 79; *Whiting v. Bartholomew*, 21 Conn. 213.

west the smoke, gas and dust were driven upon the plaintiff's premises, and into and upon his dwelling, rendering the air very unpleasant and disagreeable to breathe. The dust from the smoke settled upon the furniture, and upon the cream on the milk set away to rise, and produced pain in the eyes and head of those within its sphere, and was productive of ill effects to those with weak lungs. In laying down the rule of law applicable to this class of injuries, HARDIN, J., said: "The plaintiff is entitled to enjoy his premises free from the presence of *smoke, gases or dust* proceeding from the defendants' kilns, and the defendants have no right thus to pollute the air *and disturb the comfortable enjoyment of the plaintiff's premises.*"

SEC. 443. In *Walter v. Selfe*, 4 Eng. Law & Eq. 15; 15 Jur. 416, the plaintiff was the owner of a dwelling-house, with an office and outbuildings, and grounds adjoining. The defendant commenced the manufacture of bricks upon premises adjoining, and the smoke developed in the process of burning floated over the plaintiff's premises, and entered his dwelling, and rendered its enjoyment physically uncomfortable.

It was contended upon the part of plaintiff that he had a right to an untainted and unpolluted stream of air from all directions over his premises, but this right was denied by the defendant. KNIGHT BRUCE, V. C., in disposing of this question, said: "The first point disputed or not conceded is the question as between the defendant, in his character of a person owning, using and occupying *his* parcel of land on the one hand, and the plaintiffs in their character of owner and occupants of the house, offices and gardens on the other, whether the plaintiffs are entitled to an untainted and unpolluted stream of air for the necessary supply, and reasonable use of, the occupant and his family there; or, in other words, to have there, for the ordinary purposes of breath and life, an unpolluted and untainted atmosphere. And there can, I think, be no doubt in *fact* or in *law* that this question must be answered in the *affirmative*, meaning by untainted and unpolluted, not air as fresh, free and pure as at the time of building the plaintiff's house the atmosphere then was, but air not rendered to an important degree less compatible, or, at least, not

rendered *incompatible* with the *physical comfort* of human existence, a phrase to be understood, of course, with reference to the climate and habits of England. * * * That the process of manufacturing brick in the manner begun and continued by the defendant must communicate smoke, vapor and floating substances of some kind to the air, is certain. I think it plain, also, from the relative position of the two parties, that this *smoke*, and this *vapor*, and these *floating substances*, must wholly, or to a great extent, in fact, become mixed with the air supplied to the plaintiff's house, and in part, at least, of the garden or pleasure ground belonging to it, and this, without being previously so dispersed or attenuated as to become imperceptible, or to be materially impaired or diminished in force. I conceive that the plaintiff's house, and at least a part of his pleasure grounds, must in general, or often if the manufacture shall proceed, be subject, substantially, as far as the quality of the atmosphere is concerned, to the original and full strength of the mixture or dose produced. The question then arises whether this is or will be an inconvenience to the occupant of the plaintiff's house—a question which I think must be answered in the affirmative—though whether to the extent of being noxious to human health, to animal health in any sense, or to vegetable health, I do not say, nor do I deem it necessary to intimate any opinion, for it is with a private and not a public nuisance that the defendant is charged." As to the degree of discomfort to be produced by an impregnation of the atmosphere by foreign substances in order to create a nuisance, the learned VICE-CHANCELLOR said "The important point next to be considered, I conceive may be thus put: Ought this inconvenience to be considered in fact as more than fanciful, or as one of mere delicacy and fastidiousness, as an inconvenience interfering with the ordinary comfort, *physically*, of human existence, not merely according to *elegant* or *dainty* modes and habits of living, but according to plain, sober and simple notions, among the English people? And I am of opinion that this point is against the defendant. As far as the human frame in an average state of health at least, is concerned, *mere* insalubrity, *mere* unwholesomeness, may possibly be out of the case; but the same may, perhaps,

be asserted of mutton tallow and other such inventions less sweet than wholesome. That does not decide the dispute. *Smell* may be sickening, though not in a medical sense. Ingredients may be, I believe, mixed with air of such a nature as to affect the palate disagreeably and offensively, though not unwholesomely. A man's body may be in a state of chronic discomfort still retaining its health, and perhaps suffer more annoyance from an impure or fetid atmosphere, from being in a hale condition. Nor do I conceive it necessary to show that vegetable life, or that health, either universally or in particular instances, is noxiously affected by contact with vapor and floating substances proceeding from burning bricks. I think that the defendant's intended proceeding will, if prosecuted, abridge and diminish seriously and materially the ordinary comfort and existence of the occupants of the plaintiff's house, whatever their rank or station, or whatever their state of health may be."

The doctrine of this case, in its fullest extent, has been adopted by the courts of this country and England, and the rule as to the degree of discomfort requisite to be produced from interferences with the atmosphere, has been generally adopted as the true rule.¹

SEC. 444. The fact that a person is in a delicate state of health and thereby more readily susceptible to ill effects from the nuisance, or that the property affected is of a delicate character and therefore more susceptible to injury than ordinary property, affords no defense whatever; *any* impregnation of the atmosphere with unnatural substances, or by artificial processes that produces actual injury to another, is a nuisance, and actionable as such, irrespective of the nature or character of the property affected thereby.² In *Cook v. Forbes* the plaintiffs were engaged in the manufacture of mats from cocoanut fibre, which had to be dipped in bleaching liquids and then hung out to dry. The defendants

¹ *Tipping v. St. Helen Smelting Co.*, 4 B. & S. 608; 116 Eng. C. L. 15; *Ross v. Butler*, 4 C. E. Green (N. J.), 294; *Francis v. Schoelkoop*, 53 N. Y. 152; *Att'y-Gen'l v. Steward*, 5 C. E. Green; 415; *Rhodes v. Dunbar*, 58 Penn. 275; *Duncan v. Hayes*, 23 N. J. 26; *Crump v. Lambert*, 3 L. R. (Eq. Ca.) 409; *Richards v. Phoenix Iron Co.*, 7 P. F. Smith (Penn. St.), 105; *Wesson*

v. Washburne Iron Co., 13 Allen (Mass.), 95; *Davidson v. Isham*, 3 Stockt. (N. J.) 207; *Bamford v. Turnley*, 3 B. & S. 81; *Barnes v. Hathorn*, 54 Me. 384; *Tenant v. Hamilton*, 7 C. & F. 122; *Cavey v. Ledbitter*, 13 C. B. (N. S.) 470.
² *Cook v. Forbes*, 5 Law Rep. (Eq. Ca.) 166; *Gullick v. Tremlett*, 2 Weekly L. R. 358.

were manufacturers of sulphate of ammonia and carbonate of ammonia from the ammoniacal liquor of gas works. The fumes from the defendant's works, particularly when the wind was in the north-west, north or north-east, floated over the plaintiff's premises, and coming in contact with the materials of the plaintiff hung out to dry, turned them from a bright to dull and blackish color, making it necessary to dye the materials over again at great expense, the color even then being permanently injured. The court regarded this as a clear case of nuisance, for which the plaintiff was entitled to redress in an action at law, but, as the injurious results were only occasional, and accidental rather than otherwise, not a proper case for an injunction until after a verdict of a court of law. Sir W. PAGE WOOD, V. C., said: "It appears to me quite plain that a person has a right to carry on upon his own property, a manufacturing process in which he uses chloride of tin, or any sort of metallic dye, and that his neighbor is not at liberty to pour in gas which will interfere with his manufacture. If it can be traced to the neighbor then, I apprehend, he will be entitled to come here and ask relief."

SEC. 445. The mere diminution of the actual or rental value of property by the exercise of a particular trade, business or use of property in its vicinity is not sufficient to make the trade, business or use of property a nuisance when the decrease in value results from the mere proximity of the business, and is attended with no other materially ill results.¹ But when the business is of a character that produces a sensible, visible injury to the property itself,² or materially interferes with its ordinary enjoyment,³ the diminution in value which results from the nuisance, is a proper element of damage, and in some cases is the actual measure thereof.⁴

When the owner of the fee of the premises affected by the nuisance is himself in possession, the injury that he sustains by reason of the discomfort produced thereby, where no tangible

¹ *Ross v. Butler*, 4 C. E. Green (N. J.), 274; *Rhodes v. Dunbar*, 8 P. F. Smith (Penn.) 275.

³ *Cleaveland v. Citizens' Gas-light Co.*, 20 N. J. 209.

² *Tipping v. St. Helen Smelting Co.*, 116 E. C. L. 608; 4 B. & S. 608.

⁴ *Houghton v. Bankhardt*, 3 L. T. (N. S.) 266.

injury is inflicted, together with the diminution of the value of the premises, are proper elements from which to estimate the damage.¹ But when the premises are in the possession of tenants, the owner of the fee cannot maintain an action, unless there is an actual injury to the reversion.² If by reason of the nuisance, he is unable to let his premises,³ or is compelled to let them at a much less rental than he otherwise would, the measure of damages would be the injury to the rental value.⁴ The difference between the rental value if no nuisance existed, and the rental value with the nuisance there, is the true measure.⁵ If the premises are not let at all, but have a dwelling upon them which is unoccupied in consequence of the nuisance, the entire rental value is the measure.⁶ Where there are no buildings upon the premises, but the land is laid out into building lots, which by reason of the nuisance are reduced in value, a recovery may be had for the difference between the value of the lots with the nuisance there and their value if no nuisance existed.⁷

It is no defense to an action for a nuisance predicated upon the loss of rent, resulting from an unlawful use of neighboring property, that the rental value of the property has been greatly increased by the construction and maintenance of the defendant's works, nor that they could not be rented at all if the plaintiff's works were to stop, nor will evidence of that character be admitted either as a defense or in mitigation of damages.⁸

But if the plaintiff himself occupies the premises, the damages are to be measured by the discomfort, and the rental value cannot be considered or given in evidence.⁹

SEC. 446. The fact that the discomfort arising from the nui-

¹ *Beardmore v. Treadwell*, 7 L. T. (N. S.) 207; *Walter v. Selfe*, 4 Eng. Law & Eq. 15; *Roberts v. Clarke*, 17 L. T. (N. S.) 384; *Luscombe v. Steere*, id. 229; *Pinckney v. Ewen*, 4 id. 365.

² *Rich v. Basterfield*, 2 C. & K. 257; *Sampson v. Savage*, 37 Eng. Law & Eq. 374; *Bennett v. Thompson*, 37 id. 51; *Hart v. Taylor*, 4 Mur. (S. C.) 313.

³ *Saville v. Killner*, 26 L. T. (N. S.) 277; *Roberts v. Clarke*, 17 id. 384.

⁴ *Francis v. Schoelkoppf*, 53 N. Y. 152.

⁵ *Bankhardt v. Houghton*, 3 L. T. (N. S.) 266.

⁶ *Bankhardt v. Houghton*, id.

⁷ *Peck v. Elder*, 3 Sandf. (N. Y. Sup. Ct.) 126; *Dana v. Valentine*, 5 Met. (Mass.) 8.

⁸ *Francis v. Schoelkoppf*, 53 N. Y. 152; *Wesson v. Washburne Iron Co.*, 13 Allen (Mass.), 95, overruling a contrary doctrine of the courts of that state.

⁹ *Potter v. Froment*, 47 Cal. 165.

sance, or the actual tangible injury to property itself therefrom is in no measure commensurate with the pecuniary loss to the owner of the works producing the injury, by having his works declared a nuisance, is entitled to no weight in a court of law, and is in no measure a defense, or a circumstance to be considered, either by the court or the jury.¹ If a party has seen fit to erect works in the vicinity of the property of others, which may injuriously affect the surrounding property, by reason of its noxious character or results, the penalty of his temerity is to be visited upon him, however severe the loss, or however much less the damage may be to his neighbor than to himself. The innocent are not to suffer, either in their property or comfort, for the promotion of another's interest or profit.² It was well said by THOMPSON, J., in *Casebeer v. Mowry*, 55 Penn. St. 423, "The amount of damage is not the sole object of an action of this nature. The *right* is the great question. It will not do to hold that one man may with impunity invade the premises of another by any thing in the shape of a nuisance, because the damage may not be appreciable. The law does not justify or excuse such an invasion, *be it ever so small*, and allows the recovery of nominal damages, at least, as evidence of the plaintiff's right. In *Pinckney v. Ewens*, 4 L. T. (N. S.) 365, the defendant carried on the trade of a fell-monger (tanner) near the plaintiff's dwelling, on quite an extensive scale. The plaintiff complained that when the wind blew from the direction of the defendant's works, noisome smells, extremely disagreeable, proceeded from the hides and lime-pits in the building, and that the water from the pits had fouled the water of a stream that flowed through his garden and

¹ Atty.-Genl. *v. Sheffield Gas Co.*, 6 L. R. Eq. Ca. 232; *Casebeer v. Mowry*, 55 Penn. St. 423; *Reg. v. Lonston*, 29 L. J. (M. C.) 118.

² *Cooke v. Forbes*, 3 L. R. Eq. Ca. 409; *Tipping v. St. Helen Smelting Co.*, 4 B. & S. 608; *Salvin v. No. Brancepeth Coal Co.*, 31 L. T. (N. S.) 154.

In *Attorney-General v. Colney Hatch Lunatic Asylum*, 4 L. R. Ch. App. 147, the court not only refused to consider the great damage which an abatement of the nuisance would occasion the defendants, but also declined to con-

sider whether it was possible for the defendants to abate the nuisance.

In *Attorney-General v. Leeds*, 5 L. R. Ch. App. 589, the court held that conveniences could not be balanced; that the fact that on the one hand the preservation of the health of a large population required that the nuisance should go on, was no defense, even though the number who were actually injured thereby was comparatively trifling. The simple question is, does a nuisance exist? If so, the law gives a remedy, and, in a proper case, equity will abate the wrong.

lawn. All the other neighbors in the vicinity of the works testified that they had never known unpleasant smells to proceed from the building. The court submitted three questions to the jury :

"1st. Was the plaintiff's enjoyment of his property sensibly diminished by the nuisance, if any, carried on by the defendant?

"2d. Is the trade of a fell-monger a proper trade?

"3d. Was the trade carried on in a proper place?

To all these questions the jury returned an affirmative answer, and judgment was rendered upon the verdict for the plaintiff, and this judgment was sustained upon a case reserved. Thus it will be seen that the ordinary uses of property take precedence over all others, and that any use which unreasonably interferes with the ordinary comfortable enjoyment of property, is in violation of the rights of others, and must yield to the superior right, however serious the loss, or disastrous the consequences may be to the wrong-doer. The usefulness of the trade, its actual *necessity* even, will not operate as a defense. This principle was established many centuries ago, and has been recognized and acted upon by the courts with almost unswerving uniformity ever since. *ROLLE* in vol. 2, pp: 140, 141 of his Abridgment, refers to a case (*Poynton v. Gill*), in which an action was brought against the defendant for melting lead so near to the premises of the plaintiff that the smoke and vapors arising therefrom spoiled the grass and wood growing upon the plaintiff's premises, and by reason of which he lost two horses and a cow depasturing there, and the learned author says: "Though this was a lawful trade, and for the benefit of the nation, and *necessary*; yet, this shall not excuse the action; *for he ought to use his trade in waste places, and great commons, remote from inclosures, so that no damage may happen to the proprietors of land next adjoining.*" The doctrine of this case is approvingly referred to by the court in *Jones v. Powell*, Palmer, 536, and has been reaffirmed in many cases, both ancient and modern.¹

¹ *Respublica v. Caldwell*, 1 Dallas, 15; *Brady v. Weeks*, 3 Barb. (N. Y. S. C.) 167; *Taylor v. The People*, 6 Parker's Crim. Rep. (N. Y.) 347; *Catlin v. Valentine*, 9 Paige's Ch. (N. Y.) 575; *Rex v. Ward*, 1 Burrows, 333; *Rex v. Niel*, 2 C. & P. 485; *Smith v. Cummings*, 2 Parsons' Sel. Ca. 92; *Morley v. Pragall*, Cro. Car. 510; *Stynan v. Hutchinson*, 2 Sel. N. P. 1105; *Rex v. Cross*, 2 C. & P. 483; *Smith v. McConathy*, 9 Mo. 517; *Staple v. Spring*, 10 Mass. 74; *Queen v. Train*, 2 B. & S. 640; *Works v.*

SEC. 447. The pursuit of any trade or occupation that impregates the air with dust of any kind, to the injury of another, is a nuisance.¹

In *Commonwealth v. Mann*, 4 Gray (Mass.), 213, the respondent was indicted for a nuisance, for screening coal near a public street in Boston whereby the dust from the coal floated over the street, to the annoyance of travelers, and the owner of property in the vicinity.

In *Cooper v. Randall*, 53 Ill. 54, the defendant was the owner of a flouring mill in the vicinity of the plaintiff's dwelling, and the dust and chaff from his mill entered the plaintiff's dwelling, and settled upon it, injuring the building and impairing its comfortable enjoyment. This was held a nuisance, and it may be regarded as well settled, that *any* trade, occupation or use of property that impregates the atmosphere with *any* foreign substance, that produces a tangible injury to property, or sensibly impairs its comfortable enjoyment, is a nuisance.

SEC. 448. The fact that the trade producing smoke to an extent to become a nuisance is a lawful trade, or that it was carried on for purposes that are necessary and useful to the community, or that it is carried on in a reasonable and proper manner, or in a proper place, will not operate to relieve the owner from liability if the trade *in fact* is productive of such ill results to others as to make it a nuisance.²

If the work is prosecuted for the government even, and pro-

Junction R. R. Co. 5 McLean (U. S.), 425; *Rex v. Ward*, 4 Ad. & El. 384; *Rex v. Morris*, 1 B. & Ad. 441; *Rex v. Tindall*, 6 Ad. & El. 143; *Beardmore v. Treadwell*, 31 L. J. (N. S.) 286; *Attorney-General v. Colney Hatch Lunatic Asylum*, 4 L. R. Ch. App. 147; *Attorney-General v. Leeds*, 5 id. 589.

¹ *Cooper v. No. British R. R. Co.*, 36 Jur. 169. In *Hutchins v. Smith*, 63 Barb. (N. Y. S. C.) 252, dust from lime kiln settling on furniture and milk. In *Ross v. Butler*, 4 C. E. Green, 294, cinders from pottery works settling upon buildings and premises. In *Wesson v. Washburne Iron Co.*, 13 Allen (Mass.), 95, cinders from iron

works entering an inn and settling upon furniture. In *Whitney v. Bartholomew*, 21 Conn. 213, cinders and ashes from blacksmith shop entering dwelling and settling upon furniture and spoiling water in the plaintiff's well. In *Cartwright v. Gray*, 12 Grant's Ch. Ca. (Ont.) 400, cinders from steam planing mill settling upon linen hung out to dry. In *Cooke v. Forbes*, 5 L. R. Eq. Ca. 166, gases discoloring plaintiff's mats.

² *Pickney v. Ewens*, 4 L. T. (N. S.) 365; *Stockport Waterworks Co. v. Potter*, 7 H. & N. 159; *Respublica v. Cauldwell*, 1 Dallas, 161; *Tipping v. St. Helen Smelting Co.*, 11 H. L. Cas. 642.

vides the materials requisite for national defense, this will be no answer to a suit for damages resulting to others from its prosecution.¹ The rights of habitation are superior to the rights of trade, and whenever they conflict, the rights of trade must yield to the primary or natural right.²

BRICK BURNING.

SEC. 449. There is no exception made by the law in favor of any trade, when its results are such as to injuriously affect the property of another; therefore, brick burning stands upon precisely the same grounds as any other business producing smoke, and is adjudged a nuisance or not by the same rules of law and evidence as apply to any other use of property producing similar results. If the business is carried on near the habitations of men, and in the process of burning the brick, large quantities of smoke are developed, that float over the premises of others and injures the property or impairs the comfortable enjoyment of others resident there, it is a nuisance and actionable as such; but if no such results ensue, it is not a nuisance, and the business is strictly lawful.

SEC. 450. It was at one time doubted whether this branch of business could be regarded as a nuisance when the brick were made from a part of the soil upon which they were burned, and because they were used for the purposes of building; but it will be seen by the cases referred to that this erroneous doctrine has long since yielded to the strict application of the principles that underlie the whole doctrine of nuisances. It is a little singular that any such doctrine should ever have had even a brief existence, as it is clearly opposed to the letter and spirit of the time-honored maxim upon which the whole law of nuisances rests, "*sic utere tuo, etc.*" There can be no more excuse for a man to corrupt the air that floats over my premises with smoke and deleterious vapors, because his soil yields brick clay, than there can be for his sending similar mixtures there from the exercise of any other business. The principle, and indeed the law now, is the

¹ *Beardmore v. Treadwell*, 7 L. T. (N. S.) 20; *Poynton v. Gill*, 2 Lilly's Register, p. 309; *Bamford v. Turnley*, 6 L. T. (N. S.) 721.

² *Aldred's Case*, 5 Coke. 58a.

same in the one case as in the other, and, even though the brick are being burned for the construction of a house upon the premises where the kiln is erected, no exception is made, and the results, if sufficiently extensive, are as much a nuisance as though the burning was for the purposes of traffic.

SEC. 451. The English courts in the case of *Hole v. Barlow*, 4 C. B. (N. S.) 336, decided in 1858, made a wide departure from the doctrine of previous cases decided in the courts of that country, and held that the business being a lawful and necessary business, and carried on in a proper and usual manner, and in a proper place, was not a nuisance. But this attempt to overturn the entire doctrine of the courts in restraint of noxious trades, met with no favor and was never recognized as an authority upon similar questions by any of the courts of England. But, as the question of nuisance, as applicable to this particular business, is one about which some doubt has been expressed by some of the courts, I have deemed it advisable to give a brief summary of all the cases bearing upon the question.

SEC. 452. The first case of which we have any account in which this question was raised is that of *The Duke of Grafton v. Hilliard et al.*, decided in 1736, and found in the Registrar's book, fol. 336 (J. S.), and referred to in the case of *Attorney-General v. Cleaver*, 18 Vesey, 210. In that case it appears that the defendants erected brick kilns in the fields in the parish of St. George, Hanover Square, called Hay Fields, within 250 yards of the Duke of Grafton's dwelling in Albermarle street. The plaintiff, with others in the vicinity, brought their bill to restrain the defendants from burning bricks there, and also alleging that the defendants had brought stone on to the premises, and also proposed to erect lime kilns and burn lime there, and praying that they might be restrained therefrom, alleging that the burning of bricks in that locality would be so great an annoyance to them that they would be obliged not only to remove from their premises, but that their furniture would be spoiled, and that the burning of lime would not only be a great annoyance to them, but would also seriously prejudice their houses and furniture. The

court thereupon granted an order that the defendants, having notice thereof, show cause by the last day of the term why they should not be restrained from burning bricks or lime in the places named in the bill, and subsequently the time for hearing the cause being enlarged, a temporary injunction was granted. The defendants answered the bill and alleged "that the Right Hon. WILLIAM LORD BERKLEY being seized of several fields in the parish of St. George, Hanover Square, they on the 8th day of April, 1673, entered into articles of agreement with the said Lord BERKLEY and his son (heir apparent) for a part of said fields, being the part called the brick field, to build upon, at an annual rent of £420 for a term of ninety-four years; that there being some earth upon the premises that could be made into bricks, they sold it to one Whitaker, with the privilege of burning the same upon the premises, subject to the restriction that no bricks are to be burned on said premises before the 1st of July, and that the burning shall not continue later than the 1st day of August; that it has always been customary in the case of new buildings, where fresh ground has been broken and brick earth has been found, to burn the same on the premises, even though in the vicinity of dwelling-houses; that the plaintiffs during the time when said burning would take place, would be in the country and their residences closed; that so far as the burning of lime on the premises is concerned, they had no interest therein, and had given no permission therefor. They also set up that the time of burning would be so short, and at such a season, that but little, if any, annoyance would result therefrom to the plaintiffs, and that their furniture would not be thus damaged. Upon these facts the court discharged the order. Thus it will be seen that this case, which is often quoted upon questions of this character, really left the question undecided. The court (Lord HARDWICKE), being satisfied that no damage would result to the property of the plaintiffs by the business, and that they would suffer no personal annoyance or discomfort therefrom, as they would be away in the country during the period of burning, could not consistently continue the injunction. The case of *Attorney-General v. Cleaver*, 18 Vesey, Jr., 220, is frequently quoted as an authority to show that brick burning is not a nuisance, but no such point was

decided or passed upon by the court. That was an action in the name of the Attorney-General to restrain the defendant from carrying on the business of a soap-boiler in a public place, and the only point decided by the court was as to the jurisdiction of the court of chancery to restrain a public nuisance, until the question of nuisance had been determined in a court of law. It is true Lord ELDON referred to the case of the Duke of *Grafton v. Hilliard*, and said that Lord HARDWICKE in that case held that "brick-burning though carried on near the habitations of men is not a public nuisance *per se*." But with all due deference to the learned judge, inasmuch as the case was never reported, and the only account of it is to be found in the Registrar's Book before referred to, and as not one word of Lord HARDWICKE's opinion is there given, it is evident that the court was mistaken as to what Lord HARDWICKE said. The Duke of Grafton brought a private suit in his own name, and according to the record of the case, the question as to whether this was a public nuisance, was not raised or passed upon by the court. That the court did regard it as a nuisance, is evident from the fact that it granted a temporary injunction, and only dissolved it when it appeared from the proof that no damage would ensue therefrom, owing to the fact that the burning was to be done during the month of July and that no annoyance would ensue to the plaintiff or his family, as during that period they would be away in the country, and no claim was made, that any tangible injury to property would ensue. But in any event, the statement in *Attorney-General v. Cleaver* is mere *dicta* and entitled to no weight as an authority on this point.

SEC. 453. In 1839, in the courts of Scotland, an action was brought by *Donald v. Humphrey*, 14 F. (Sc.) 1,206, for erecting a brick kiln near the plaintiff's dwelling. The plaintiff brought his action to restrain the burning, and insisted that the business was *per se* a nuisance, and that being carried on upon premises adjoining his dwelling, it should be restrained without proof of actual injury. But the court held that the business of burning bricks was a lawful business, and not *per se* a nuisance, but that the question as to whether it was a nuisance or not, was one of fact, to be determined by the circumstances of

each case, and refused an injunction without proof that the business was so conducted as to be a nuisance to the plaintiff.

SEC. 454. In *Barwell v. Brooks*, 1 Law Times (N. S.), 454, a motion was made before the Vice-Chancellor for an injunction to restrain the defendants from burning bricks on their own lands within six hundred feet of plaintiff's property, called East Cowes Castle, and the injunction was granted *ex parte*. On the 27th of April, 1843, upon hearing, the injunction was dissolved on the ground that the plaintiff purchased his land after the use of the defendant's land, as building land, and the burning of bricks thereon was publicly known, and because the brick-burning would be temporary only; that is, for such a length of time as would be sufficient to build the house. But the plaintiff in July following filed a supplemental and amended bill, upon which an injunction was granted, restraining the defendants from burning or permitting any bricks to be burned on a particular piece of ground named in the order. And the defendants having violated the order, two of them were committed for contempt. And on a motion made on the 29th of August to discharge both orders (that for the injunction and committal for contempt) a perpetual injunction was issued. Thus in this case we have the important point decided, not only that the burning of bricks in the vicinity of residences is a nuisance, but also the further fact that "coming to a nuisance" does not prevent one from availing himself of all proper remedies for damages sustained therefrom.

SEC. 455. In 1851 the case of *Walter v. Selfe*,^{*} 15 Jurist, 416, was heard before J. L. KNIGHT BRUCE, V. C., and the defendants were enjoined from burning bricks in the vicinity of the plaintiffs' premises so as to occasion damage or annoyance to the plaintiffs, or injury or damage to the buildings thereon standing, or the shrubberies and plantations named in the bill.

KNIGHT BRUCE, V. C., in delivering the opinion of the court upon the question of nuisance, in addition to that portion of his opinion given on a previous page of this chapter, said, "It has been suggested, as a ground for not interfering against the defendant, that in making and burning bricks on his land, he is only

using his own soil in a manner at once common and useful, and in a convenient way for himself, and the case has been compared to that of a mine. The argument if adopted would prove too much. There are notorious instances of various kinds in which the rights of a neighboring occupier, or a neighboring proprietor, prevent a man from using his land as, but for those rights, he properly and lawfully might use it. A man may be disabled from building on his own land, as he may wish, by reason of his neighbor's rights. So the proprietor on whose land a spring arises may be unable to stop, divert or foil it, by reason of the rights of proprietors of neighboring land. It may be one of the most convenient things in the world for the owner of a mine to manufacture or smelt the mineral at its brink, but there may be the rights of others which make it unlawful for him so to do. The case of a lime-kiln or chalk-kiln is an acknowledged case in point of law, and I am not aware that it makes any difference whether the lime-stone or chalk are obtained from the same land or not."

In this case the brick kiln was located about 350 feet from the plaintiff's house and grounds. The doctrine to be adduced from the case is, that every person is entitled to fresh, pure air; that is, air as fresh and pure as in the locality, and by the ordinary uses of property, could reasonably be expected; and that *any* trade, occupation or use of property that essentially impairs or abridges this right whereby the actual physical comfort of those living within the sphere of its effects is essentially abridged is a nuisance, and that in determining whether the degree of discomfort produced is such as to bring the act within the idea of a nuisance, reference is to be had to the ordinary uses of property, and mere fanciful inconveniences, such as are incident to elegant and dainty modes of living, are not to be considered.

SEC. 456. In *Pollock v. Lester*, 11 Hare, 266, decided in 1853, two years after the decision of *Walter v. Selfe*, the plaintiff was the proprietor of a lunatic asylum with grounds adjoining, in which were a number of trees and quantities of shrubbery and plants. The defendants made preparations for the burning of bricks on a lot 180 feet distant, and the plaintiff brought his bill

praying for an injunction to restrain the defendant, alleging in his bill, that the smoke and vapors arising therefrom would be injurious to his patients, and cause them to leave his asylum, and would also injure the trees, shrubs and plants thereon growing. The injunction was granted, and the doctrine of *Walter v. Selfe* was followed and fully approved.

SEC. 457. Five years later, in 1858, in the case of *Hole v. Barlow*, 4 C. B. (N. S.) 336, the English courts made a departure from the doctrine of *Walter v. Selfe*, and held that brick making being a lawful and necessary business, was not a nuisance and that no action would lie. Four years later, in the case of *Beardmore v. Treadwell*, 31 Law Journal (N. S.), 873, the case of *Hole v. Barlow* was in effect overruled, although the court attempted to distinguish that case from the one under consideration, on the ground that in that case it did not appear that the defendant could have burned his brick elsewhere. This is rather a lame excuse for a doctrine that had been boldly put forward to overthrow principles that had been firmly established by an unbroken current of authorities for nearly a century, and in *Beardmore v. Treadwell* the court granted an injunction restraining the burning of bricks within 650 yards of the plaintiff's dwelling, holding that the burning of bricks within 350 yards of the plaintiff's residence was a nuisance, and that, too, although the bricks were to be used in the erection of government fortifications.

SEC. 458. In the Queen's Bench, in the same year, in the case of *Bamford v. Turnley*, 31 L. J. (N. S. Q. B.) 286, the case of *Hole v. Barlow* was directly and in terms overruled. In that case the plaintiff brought an action against the defendant for burning brick near his dwelling-house, whereby serious annoyance and discomfort was produced by the smoke from the kilns to the occupants of his dwelling. The defendant shows that both estates were parts of an estate which had formerly belonged to one owner, and which had been divided up into, and sold as building lots, and that the printed particulars of the sale of all the lots stated, among other things, that there was plenty of brick clay and gravel on the premises, which presented an advantageous

opportunity of carrying out safe and profitable building operations. Bricks had been made upon the very spot where the plaintiff's house stood, and the plaintiff was aware of all these facts. The defendant also knew that his only object and purpose in burning bricks upon his premises was to obtain materials for building upon his land. COCKBURN, J., before whom the case was tried, following the rule in *Hole v. Barlow*, charged the jury that if they thought the spot was convenient and proper, and that the use by the defendant of his premises was, under the circumstances, a reasonable use by the defendant of his own land, the defendant would be entitled to a verdict. The jury found for the defendant, but upon hearing in the Exchequer Chamber it was held that the instructions were erroneous, and that it was no answer in an action for a nuisance, creating actual annoyance and discomfort in the enjoyment of neighboring property, that the injury resulted from a reasonable use of property, and that the act was done in a convenient place; nor that the same business had been carried on in that locality for seventeen years.

SEC. 459. The next year (1863) in *Cavey v. Ledbitter*, 13 C. B. (N. S.) 470, in an action by the plaintiff against the defendant for burning bricks in the vicinity of the plaintiff's residence, annoying the plaintiff's family and producing essential discomfort by reason of the fumes and vapors arising therefrom, and injuring the plants and flowers growing upon the premises, the court held that it was no sufficient answer, that the business was carried on in a convenient place. That if damage actually resulted to the plaintiff in the manner complained of, the act was a nuisance, the court directly approving the doctrine of *Bamford v. Turnley*, and repudiating the doctrine of *Hole v. Barlow*. In 1870 in the case of *Bareham v. Hall*, 22 Law Times (N. S.), 116, an injunction was granted restraining the defendant from employing a brick kiln in front of and one hundred yards from the plaintiff's residence, upon the ground that the burning of bricks by the usual processes and in any of the modes known is a nuisance *per se*.

SEC. 460. In *Roberts v. Clarke*, 18 L. T. (N. S.) 49, heard in

1867 the plaintiff was the owner of a tract of land at Hackney adjoining lands of the defendant. The plaintiff had, at a great expense, erected a large number of villa residences upon his lands which rented at £60 a year. Upon the defendant's land, in the rear of these residences and at a distance of about 220 yards was an old gravel pit occupied by defendants. This was a large open space upon which had been thrown a large quantity of putrid, decomposed animal and vegetable matter. There was no brick clay upon the premises, but the defendants carted clay upon the land and made bricks there, at a distance of about two hundred and twenty yards from the plaintiff's house, but less than one hundred yards from any of the other houses. In burning the brick, the defendant mixed the animal and vegetable matter on the premises, with the clay, and the stench arising therefrom was very offensive and injurious. This smoke charged with these noxious smells, floated over the plaintiff's premises, and was so disagreeable, that many persons who otherwise would have hired these houses, declined to do so, and the plaintiff thereby sustained damage. The defendant by way of defense insisted that he and his predecessors having burned brick there ever since 1825 they had acquired a prescriptive right to do so, as against the plaintiff and all others injuriously affected thereby. That the fumes arising from the burning had frequently during that period, been injurious to the plaintiff and his farm. That putrid matter of the worst description had for a long time been deposited on the farm and mixed with the clay and burned, the fumes therefrom floating over the plaintiff's premises as now. He also insisted that the plaintiff having recently come to the nuisance, could not complain of its ill results. An injunction was granted restraining the defendant from burning bricks so as to injuriously affect the plaintiff's premises. The VICE-CHANCELLOR said: "In order to acquire a prescriptive right to carry on a noxious trade in a certain locality, the trade must have been carried on for twenty years, and the right must have been exercised at least the first and last year of that period. It has been held that brick burning carried on in the ordinary way within two hundred and forty yards of a dwelling, is a nuisance, and two hundred and forty yards is by no means the limit."

SEC. 461. In the same year the case of *Luscombe v. Steere*, 17 L. T. (N. S.) 229, was heard. The defendant rented premises and began to burn bricks within 1,442 feet of the plaintiff's house and on premises adjoining. At the time when the bill was brought no actual injury had been sustained by the plaintiff, but the bill was predicated upon a prospective nuisance. There had been a verdict at law against the defendant at the suit of the plaintiff but there had been changes made in the mode of burning, so that at the time when the bill was brought no actual nuisance existed. The court denied an injunction upon the ground that, no actual injury having been sustained, no nuisance existed, and that no evidence having been given to establish the fact of prospective nuisance, it was not a case for equitable relief. But the court said: "If the business should hereafter become a nuisance to the plaintiff, he can then apply to the court for relief, and his rights will be protected."

SEC. 462. Thus it will be seen that the doctrine of the English cases is nearly uniform in support of the principles enunciated in *Walter v. Selfe*, and establishing brick burning as so far a nuisance that the opposite would seem to be the exception rather than the rule. Indeed in *Barham v. Hall*, last cited, the court virtually held that it is so far a nuisance, as to require proof that the business is conducted by new processes so improved as to overcome the ill results incident to the old modes, rather than proof that actual deleterious results are produced.

SEC. 463. In this country the question has never been directly raised or passed upon by the courts except in two or three cases one of which is *Huckenstine's Appeal*, 70 Penn. St. 102; also reported in 10 Am. Rep. 679. The doctrine of this case is of no practical value, for the reason that the main point in the case is evaded. The court, it is true, say that "Brick-making is a useful and necessary employment and must be pursued near to towns and cities, where bricks are chiefly used. Brick-burning, an essential part of the business, is not a nuisance *per se*. *Att'y-General v. Cleaver*, 18 Vesey, Jr., 219." But without deciding whether in this case the burning of brick

was a nuisance, it simply declined to exercise its restraining power to enjoin the business, for the reasons, that there were so many similar nuisances in the locality that it was unable to say that this sensibly increased the discomfort therefrom; and because it was not satisfied that any real injury had ensued therefrom, and that in any event the plaintiff's remedy at law was ample to establish his right, and redress his injury, if he had sustained any.

SEC. 464. The actual doctrine of this case is well sustained by authority and upon principle. The court failed to find from the evidence that the plaintiff sustained, or was likely to sustain any damage from the business. This disposed of the case. The court was also right in holding, that what might be a nuisance in one locality might not be so in another, where similar effects had existed for many years, because of the utter impossibility of saying whether this one sensibly increased the discomfort or damage therefrom.¹

SEC. 465. In *Campbell v. Seaman*, 2 N. Y. Sup. Ct. Rep. 237, the question came up on a complaint praying for an injunction to restrain the defendant from using mineral coal in the process of making and burning brick, on the ground of injury to the shade trees, grape-vines and shrubbery upon the premises of the plaintiff. The injunction was granted. The court say that the general doctrine of *Huckenstine's Appeal* is in conflict with the authorities in New York, and the court cites a portion of the opinion in that case, which was quoted from the opinion of Lord Chancellor WESTBURY, in *Tipping v. St. Helen Smelting Co.*, 116 E. C. L. 608, as follows: "If a man lives in a town, of necessity he must submit himself to the consequences of the obligations of trade which may be carried on in his immediate neighborhood, which are actually necessary for trade and commerce; also for the enjoyment of property and the benefit of the inhabitants;" and the learned judge in *Campbell v. Seamen* says: "Such a doctrine carried out ignores the law of nuisances in all cases where it is more profitable to live by their creation and continuance, than by healthful employment."

¹ *St. Helen Smelting Co. v. Tipping*, 116 E. C. L. 608.

But the learned judge lost sight of the fact that this very principle enters into and forms an essential part of the common law of every civilized country on the face of the earth ; that without it no city could maintain its business or its population for a single month. When people choose to come together in compact communities, to build or to live in populous cities, they have a perfect right to do so, but when they do it, of necessity they must give up many rights, and submit to many discomforts which would not be incident to life in the country. They cannot have an atmosphere pure and free from taint and pollution. They cannot have the same degree of quiet and freedom from noise ; indeed in every respect essential for the maintenance of such communities they have got to yield more or less of their personal comfort to the necessities of trade and of life in such localities. The law always has recognized this principle, and the books are full of instances where courts have made wide distinctions in the application of such principles between cities and the country. It does not follow that the court intended by this to convey the idea that any business may be carried on in a city, that is a nuisance *per se* or *in consequence*, for such was not the view of the court, nor the application that it gave it. But it was an illustration of the rule, that in determining whether a certain trade is a nuisance, it will consider the location as well as the effect.¹ Lord CRANWORTH in the same case from which the language in question is quoted, says: "I perfectly well remember when I had the honor of being one of the Barons of the Court of Exchequer trying a case in the county of Durham, where there was an action for smoke in the town of Shields. It was proved that smoke did come incontestably, and in some degree, interfered with a certain person, and said: 'You must look at it, not with a view whether abstractly that quantity of smoke is a nuisance, but whether it is a nuisance to a person living in the town of Shields ; because if it only added in an infinitesimal degree to the quantity of smoke, I thought that the state of the town rendered it impossible to call that a nuisance.'" Now can any exception be taken to this doctrine upon principle? If in a manufacturing town like Pittsburgh, where there are innumerable forges and shops

¹Lord VANDERSLEY, V. C., in *Wood v. Sutcliffe*, 8 E. L. & E. 221.

where immense quantities of smoke are developed and constantly envelop the cities, I set up a shop which develops such quantities of smoke that in another locality it would be a nuisance, but which there does not sensibly increase the quantity already constantly produced, can my works be restrained as a nuisance? I am aware that there are authorities both ways, but the better doctrine seems to be that it is proper to consider the character of the surrounding business, and that, if it cannot be said that my shop sensibly increases the volume of smoke it cannot be claimed that I have infringed the rights of others to their damage, at least, to such an extent as to warrant the intervention of a court of equity.¹ But if my shop produces a sensible increase of the volume of smoke, so that it works an injury, then unquestionably my business is a nuisance, and the inhabitants of the locality are not required to submit to it, for whatever trade produces a sensible injury to property, or sensibly promotes physical discomfort is a nuisance,² and cannot be justified on the ground that there are other similar nuisances in the same locality.³ The very foundation of a nuisance is injury and damage to a right. In order to constitute a nuisance, there must be a violation of a clear and well-defined right, and that violation must produce injury and damage, or be of such a character that the law will presume damage, as in the case of building a house so that the eaves overhang the lands of another,⁴ or an obstruction of a private way.⁵ But in the case of the shop, unless its smoke,

¹ Lord Chancellor Westbury's opinion in *St. Helen Smelting Co. v. Tipping*, 116 E. C. L. 608; *Gaunt v. Finney*, L. R., 8 Ch. App. 8. In *Cleveland v. Citizens Gas-light Co.*, 5 C. E. Green (N. J.), it was held that where the trade did not materially add to the nuisance already existing, a court of equity would not interfere to restrain the trade or declare it a nuisance. In *Ball v. Ray*, L. R., 8 Ch. App. 467, the court say that an increase of a right previously acquired may constitute a nuisance, that is, if a party has acquired a right to carry on an offensive trade in a particular way, and producing a limited amount of injury, this will not justify him in so conducting the same business as to increase the injury or nuisance.

² *Ball v. Ray*, L. R. Ch. App. 467; *Crump v. Lambert*, 3 L. R. Eq. Cas. 409; it was held that any material addition to the smoke, effluvia and noise arising from the carrying on of a trade in a manufacturing town where similar establishments are operated, will be a nuisance and restrained as such. *Robinson v. Baugh*, 31 Mich. 291.

³ *Crump v. Lambert*, 3 L. R. Eq. Cas. 467; *Cleveland v. Citizens' Gas Light Co.*, 5 C. E. Green (N. J.), 201; *People v. Mallory*, 4 N. Y. Sup. Ct. 274; *McKeon v. See*, 51 N. Y. 511; 4 Robt. (N. Y.) 247; *Crowley v. Lightowler*, 2 L. R. Ch. App. 486.

⁴ *Fay v. Prentice*, 1 C. B. 828.

⁵ *Smith v. Wiggin*, 52 N. H. 112; *Allen v. Ormond*, 8 East, 4; *Duncan v. Louch*, 6 Q. B. 904.

fumes and vapors sensibly increase the volume already created, it cannot be said that any one is injured or damaged thereby, and consequently no right is violated. Thus in the case of *Rex v. Watts, Moo. & M. 281*, the defendant was indicted for setting up a horse-boiling establishment, which is one of the most offensive trades, and had carried it on there for many years before the defendants came to them, but its extent was much greater under them than it had been before; it was proved that the place when they came there was full of establishments carrying on trades of the most offensive character, and it being shown that the defendants carried on their trade in such a manner that there was but very little, if any, increase in the nuisance from what it was when they came there, it was held that the business was a nuisance *per se*, but considering the manner in which the neighborhood had always been occupied, it would not be a nuisance there, unless it occasioned more inconvenience as it was carried on by the defendant than it had done before, and the defendants were acquitted. If the annoyance had been increased by the defendants, it would have been an indictable nuisance.

SEC. 466. So in the case of *Rex v. Bartholomew, Peake, 71*, it was held that a person cannot be indicted for setting up a noxious trade in a neighborhood in which offensive trades have long been borne with, unless the inconvenience to the public be thereby increased. But in a later case (*Rex v. Niel, 2 C. & P. 485*), which was an indictment for carrying on the business of varnish making near a highway, it was proved that the smells issuing from the respondent's factory were a great annoyance to people traveling along the highway; the defense was two-fold: First, that the smells were not unwholesome, and secondly, that in the immediate neighborhood there were several houses for slaughtering horses, a brewery, a gas manufactory, a melter of kitchen stuff and a blood-boiler, and that although the accumulation of all the smells was a nuisance, yet the defendants alone would not be so. ABBOTT, C. J., said: "It is not necessary that a public nuisance should be injurious to health. If there be smells offensive to the sense, that is enough, as the neighborhood has a right to fresh and pure air. It has been proved that a num-

ber of other offensive trades are carried on near this place, but the presence of other nuisances will not justify any one of them. The more there are the more fixed they will be, and one, is not less subject to prosecution because others are culpable. The only question, therefore, is this: is the business, as carried on by the defendant, productive of smells offensive to persons passing along the highways?" The doctrine of this case is not really opposed to that of the two preceding cases, for the case turned on the question whether in point of fact this particular business created a sensible nuisance, distinct from the others, and it being found that it did, the defendant was convicted. In the case of *Huckenstine's Appeal*, ante, the court held that a court of equity would not interfere to restrain the exercise of a trade producing smoke and noxious vapors, when the locality in which the business was prosecuted was filled with establishments of a similar character, producing similar results, particularly where it was doubtful whether any damage therefrom actually ensued.¹ The court did not attempt to pass upon the question of nuisance, but left the party to his remedy at law, to have the question passed upon by a jury. Thus far the court was clearly right, but there is much in the *dicta* of the court that is obnoxious to criticism.

SEC. 467. If the court intended to adopt the doctrine that a noxious trade, set up in the vicinity of other similar establishments,

¹ In *Mohawk Bridge Co. v. R. R. Co.*, 6 Paige's Ch. (N. Y.) 554, it was held that where the thing is not in itself a nuisance, the court will not interfere until the matter has been tried at law, following the doctrine laid down by Lord BROUGHAM in the *Earl of Ripon v. Hobart*, Cooper's Rep. 343.

A court of equity will not interfere unless the injury is such that in its very nature it is not susceptible of adequate redress at law, or unless the mischief is of such an irreparable character, or so constantly recurring that it cannot be otherwise prevented. *Van Bergen v. Van Bergen*, 3 Johns. Ch. (N. Y.) 282; *Attorney-General v. Utica Ins. Co.*, 2 id. 202; *Gardner v. Village of Newburgh*, id. 464; *R. R. Co. v. Archer*, 6 id. 83; *Belknap v. Belknap*, 2 id. 413; *Livingston v. Livingston*, 6 id. 497; *Croton Turnpike Co. v. Ryder*, 1

id. 615; *Belknap v. Trimble*, 3 Paige's Ch. (N. Y.) 577; *Read v. Gifford*, 1 Hopkins' Ch. (N. Y.) 416; *Hammond v. Fuller*, 1 Paige's Ch. (N. Y.) 197; *Ogden v. Gibbons*, 4 Johns. Ch. (N. Y.) 157; *N. Y. v. Mapes*, 6 id. 46; *Burrows v. Richards*, 8 Paige's Ch. (N. Y.) 351. In *Attorney-General v. Nichol*, 16 Vesey, Jr., 333, Lord ELDON put the jurisdiction of a court of equity in cases of nuisance upon the ground of material injury and troublesome mischief, which required a preventive remedy as well as compensation in damages. In *Brown's case*, 2 Vesey, Jr., 414, Lord HARDWICKE intimated that in order to warrant an injunction in case of a nuisance, the rights of the parties must have been first settled at law, or the party seeking the injunction have been for a long time in the exercise of the right invaded.

could not become a nuisance in that locality, or that any exceptions should be made in favor of a business lawful in itself, and useful in its results, that is clearly a nuisance, except for the fact of location and usefulness, then it stands outside the pale of all recognized modern authority, and is entitled to no weight outside of the State of Pennsylvania. But I do not understand this to be the doctrine of the case. It is simply a review of the grounds that should influence a court of equity in granting or refusing an injunction to restrain the exercise of a trade, before the rights of the parties and the question of nuisance have been passed upon in a court of law, and to that extent, the case is not obnoxious to criticism and is sustained by multitudes of authorities. It is the very ground upon which an injunction was denied in *Atty-Gen'l v. Cleaver*, and it has always been regarded as quite proper for a court of equity to send parties to a court of law to have their rights determined before it would interfere by injunction, except where irreparable mischief would result from delay.

SEC. 468. There is no case in which brick-burning has ever been held a public nuisance, but there is no doubt but that it would so be held when carried on so near to a city or town, or a public street that the public were thereby materially annoyed and injured, but being a business that is generally conducted away from public places, it has never come under the purview of criminal courts. The business must necessarily be conducted in localities where the earth peculiar to its manufacture exists in sufficient quantities, and persons who undertake these enterprises will rarely hazard the expenditure necessary to establish the business so near to habitations, towns or public places, as to render it obnoxious to that extent that it becomes a public nuisance. This as well as any other business producing smoke and noxious vapors, may lawfully be conducted so far from public places and human habitations that the smoke and vapors are so diffused and attenuated before they reach such places as to produce no material injury or annoyance.¹

¹ *Walter v. Selfe*, 4 Eng. Law & Eq. 15. In *Campbell v. Seamen*, 63 N. Y. 598, it was held that where one in manufacturing bricks upon his own land, in burning the same, sent noxious and poisonous gases over the lands of another, injuring vegetation

— principally ornamental trees — it was an actionable nuisance, although the injury was only occasional. See, also, *Fusileer v. Spaulding*, 2 La. 773, where the burning of bricks near a dwelling was held a nuisance, and was restrained.

CHAPTER FOURTEENTH.

NOXIOUS VAPORS.

- SEC. 469. Vapors deleterious to animal or vegetable life.
470. Lime kiln held a nuisance by reason of effect of vapors on vegetation.
471. Brewery, lead works, soap boilery, lime kiln, etc., held nuisances.
472. Substantial injury must result.
473. Rule in *Salvin v. North Brancepeth Coal Company*.
474. Injury must be sensible, visible, appreciable.
475. Vapors from artificial causes.
476. *Prima facie* nuisances.
477. Rule in *Campbell v. Seaman*, and in *Savill v. Killner*.
478. Injury to property or to its comfortable enjoyment.
479. Ignorance of the deleterious results of a trade no excuse.
480. Fact that other nuisances exist in the vicinity no excuse.
481. Rule in *McKeon v. Lee*.
482. Effect of giving up part of a building to business purposes, as affecting the equitable rights of parties; injunction after a verdict at law.
483. Injunction after a verdict at law.
484. When one who maintains a nuisance is not estopped from proceeding to abate another nuisance.
485. Lawfulness, usefulness, or necessity of trade no defense.
486. Question of care or skill not involved.
487. Use of property in *any* way whereby hurtful vapors are produced is a nuisance.
488. Where a right is violated, the law will not balance conveniences.
489. Test by which to determine convenience of the place.
490. The uses to which the locality is devoted may be considered.
491. Presence of other nuisances no excuse if the nuisance complained of adds sensibly thereto.
492. Injury and damage are the test of nuisance.
493. Rule in *Stockport Water Works Co. v. Potter*.

SEC. 469. The same rule of law applicable to smoke, applies also to noxious vapors. The right to a pure and uncontaminated atmosphere extends not only to an atmosphere sufficiently pure for all the purposes of breath and life, but also to an atmosphere free from noxious mixtures that are deleterious to animal or vegeta-

ble life.¹ Indeed, the earliest instances which we have of courts sustaining actions for injuries resulting from noxious trades, are those in which the vapors issuing from the works complained of were injurious to vegetable life, or were productive of tangible injury to property.²

SEC. 470. The first case of this character to be found in the books is that of *Ric de D. v. Richards* and *Swain*, 4 Assize Book, fol. 3, p. 6. In that case the plaintiff brought a writ of *quod permittat* against the defendant for erecting a lime kiln and burning lime upon their premises adjoining the premises of the plaintiff. The plaintiff alleged that the vapors arising from the kiln in the process of burning, escaping over his premises, burned and scorched the apple, pear and other trees thereon growing, and rendered them dry and unfruitful. HERLE, J., before whom the action was tried, held that the nuisance was well assigned. The defendants set up a plea in defense that their father built the lime kiln in question, and used it for burning lime before the plaintiff had any interest in the frank tenement. But the court said: "It might be that the father had the kiln there, but did not use it, and the tort began with the user; or, that the tort was begun and then discontinued and renewed again, after he was possessed of the frank tenement; and in that event he shall have his assize. Thus if my father had a right of way, which was stopped by a hedge or by a ditch lined across it, and the tort was submitted to during all the life-time of my father, and after his death, I find the way

¹ *Campbell v. Seamen*, 2 N. Y. Sup. Ct. Rep. (Parsons' Ed.); *Saville v. Killner*, 26 L. T. (N. S.) 277; *Salvin v. North Brancepeth Coal Co.*, 31 L. T. (N. S.) 154; *Tipping v. St. Helen Smelting Co.*, 4 B. & S. 608; 11 H. L. Ca. 642; 116 Eng. C. L. 608; 12 L. T. (N. S.) 776; *Smith v. Phillips*, 8 Phila. (Penn.) 10; *Huckenstine's Appeal*, 70 Penn. St.; *Bankhardt v. Houghton*, 27 Beavan 425; *Houghton v. Bankhardt*, 3 L. T. (N. S.) 266; *Ward v. Lang*, 35 Jur. 408; *Cooper v. N. B. R. Co.*, 2 Machp. 117; *Roberts v. Clarke*, 17 L. T. (N. S.) 384; *Milligan v. Elias*, 12 Abb. Pr. (N. Y.) 259; *Jones v. Powell*, Palm. 536; *Poynton v. Gull*, 2 Rolle's

Abr. 140; *Aldred's Case*, 5 Coke, 58 a; *Hutchins v. Smith*, 63 Barb. (N. Y. S. C.); *Walter v. Selfe*, 4 Eng. Law & Eq. 15; *Rex v. Ward*, 1 Burrows, 333; *Beardmore v. Treadwell*, 7 L. T. (N. S.) 20; 3 Giff. 683; *Tenant v. Hamilton*, 7 C. & F. 123; *Pottstown Gas Co. v. Murphy*, 39 Penn. St. 392; *Ross v. Butler*, 19 N. J. 274; *Crump v. Lambert*, 3 L. R. (Eq. Ca.) 409.

² *Ric De D. v. Richards*, 4 Assize Book, fol. 3, p. 6; *Poynton v. Gill*, 1 Rolle's Abr. 140; *Aldred's Case*, 9 Coke, 58; *Robbin's Case*, 15 Viner's Abr. 27; *Jones v. Powell*, Hutt. 135; *Anonymous*, 1 Ventris, 26.

open, and enter and use it, and am afterward disturbed by the people of him who lined the hedge, I shall have an assize of nuisance." The doctrine of this case, that any trade which develops vapors that produce actual injury to vegetation, is a nuisance, has been adhered to with the strictest rigor ever since, and the books are filled with cases, in which courts of law have awarded damages for such injuries, and in which courts of equity have lent their aid to restrain the exercise of trades productive of such results.

SEC. 471. In *Lilly's Register*, vol. 2, p. 309, that learned author cites the case of one *Robins* a lace merchant in Bedford street, London, who brought an action against a brewer for damages to his goods, arising from the vapors of his brewery in consequence of the use of sea coal. The nuisance was of ten years standing, and the author says that the plaintiff had a verdict of £60, for two years damages. So in *Poynton v. Gill*, 2 Rolle's Abr. 140, it was held, that "An action lies for melting lead so near to the lands of the plaintiff, that it spoiled his grass and wood (trees) there growing, and he lost two horses and a cow depasturing there. Though this was a lawful trade, and for the benefit of the nation, and necessary, yet this shall not excuse the action, *for he ought to use his trade in waste places and great commons, remote from inclosures, so that no damage may happen to the proprietors of land next adjoining.*"

The doctrine thus announced has been undisturbed by the courts, and it is to-day the doctrine of every case in which similar questions have arisen.¹

In *Rex v. Wilcox*, 2 Salk. 458, the defendant erected a glass house at Lambeth near a public highway and in the vicinity of numerous fields and dwellings, and the smoke as vapors arising therefrom proved annoying to the public and seriously injured the vegetation in the surrounding fields. The respondent was convicted and fined for a public nuisance.

¹ *Beardmore v. Treadwell*, 21 L. J. 873; *Works v. Junction Railroad Co.*, 5 McLean (U. S.), 425; *Catlin v. Valentine*, 9 Paige's Ch. (N. Y.) 503; *Brady v. Weeks*, 3 Barb. (N. Y.) 156; *Pinckney v. Ewing*, 4 L. T. (N. S.) 365; *Bamford v. Turnley*, 16 id. 721, 3 B. & S. 62; *Respublica v. Cauldwell*, 1 Dallas (N. S.), 159; *Rex v. Tindall*, 6 Ad. & El. 145; *Rex v. White*, 1 Burrows, 333; *Rex v. Williams*, 6 C. & P. 608.

In *Rex v. Pierce*, 2 Shower, 327, the respondent erected a soap boilerly upon Ludgate hill and began the manufacture of soap, the smoke and noxious vapors from which were annoying to the neighborhood, and those passing the works in the highway. The court held that the works were a common nuisance: "For that such trades ought not to be in the principal part of the town, but in the outskirts." The court predicated their judgment in this case upon the authority of a case tried before HALE, Ch. J., in which it was held that a printer who exercised his trade in a building occupied by numerous tenants, whereby the building was shaken by the motion of the machinery, and an excessive and annoying noise was produced, was a nuisance, and also upon the authority of a case in which it was held that a brewery upon Ludgate hill was a nuisance.

In an *Anonymous case*, 1 Ventris, 26, a presentment was made in a suit against the respondent for carrying on the manufacture of glass in a public place. The respondent insisted that he ought not to be punished for erecting any thing that was necessary to his lawful trade. It was answered that "this ought to be in convenient places, where it may not be a nuisance. TWISDEN, J., said that he had known an information to be filed against one for erecting a brew-house near Sergeant's Inn, but the other judges doubted and agreed that it was unlawful only to erect such things near the King's palace."

In *Aldred's case*, 9 Coke, 59, the court say: "If a lime kiln be erected so near my house, that, when it burns the smoke of it enters into my house, so that none can inhabit there, this is a nuisance." Thus it will be seen by the cases referred to that, at a very early period in the history of courts, the rights of men to pure air were recognized, and that, while the principles as then applied were extremely crude, yet, they embody a clear recognition of the right as a *legal* right, and have ever since been maintained, with such changes in their application as the progress of mankind, and the improved state of society demanded.

SEC. 472. The injury must be clear, direct and positive. It must be the legitimate and natural result of the nuisance charged, and in no essential degree the result of other artificial causes. If

the injury is in part the result of the vapors, and in part the result of other causes, the action must fail unless it be clearly established that the injury would not have resulted except for the vapors.¹ So too, the injury must be of a *tangible* character, it must be a *sensible, visible* injury, discernible to an ordinary person and in no wise dependent upon scientific tests or microscopic examinations to discover.² The injury must be such as is apparent to the eye in its ordinary condition, and must be *actual, substantial*, and not contingent, prospective or remote, *and must be clearly traceable to the nuisance charged.*³ If there is a reasonable doubt as to the cause of the injury, the benefit of the doubt will be given to the defendant, if his trade is a lawful one, and the injury is not the necessary and natural consequence of the act, as, in all actions of this nature, the burden of proof is upon the plaintiff.⁴

SEC. 473. In the case of *Salvin v. The North Brancepeth Coal Co.*, 31 L. T. (N. S.) 154, the plaintiff was the owner of a dwelling-house and premises at Burnhill, near Durham, and the defendants were the proprietors of over 250 coke ovens at Littleburn, about 1,000 yards from the plaintiff's dwelling and within about 400 yards of his nearest plantation. The plaintiff claimed, and so alleged in his bill, that the smoke and sulphuric acid given off during the process of burning the coke were killing his trees, and injuriously affecting the vegetation on his estate. The defendants denied that coke ovens were, to any extent, injurious to vegetation, and that they certainly were not when managed in the manner that their works were, by passing the smoke under the boilers of the engine, and then sending it off through a high chimney. They also insisted that they had not, to any appreciable degree, added to the normal condition of the impurity of the atmosphere in that locality, there being no less than twenty-seven collieries, iron works, etc., within a radius of five miles from the plaintiff's house. Sir GEORGE JESSELL, M. R., among other things, said: "I do not think there is any contest between the counsel on

¹ *Scott v. Shepherd*, 3 Wilson, 403; *Vanderburgh v. Truax*, 4 Denio (N.Y.), 464; *Gibbons v. Pepper*, 1 Ld. Raym. 38.

² *Tipping v. St. Helen Smelting Co.*, 11 H. L. Cas. 642; 4 B. & S. 608; 116 E. C. L. 608.

³ *Salvin v. North Brancepeth Coal Co.*, 31 L. T. (N. S.) 154.

⁴ *Scott v. Shepherd*, 3 Wilson, 403; *Oldaker v. Hunt*, 19 Beavan, 485; *Rex v. Medley*, 6 C. & P. 292.

either side as to the law. They have both stated to me that the real question that I have to try is, whether a substantial injury, meaning an injury for which a jury would give the plaintiff substantial damages, has been made out. The case may be fairly divided into two complaints. The first complaint is an injury to personal comfort, and as to that there are two observations to be made: First of all, is the injury of such a nature as substantially to interfere with the comfort and enjoyment of the plaintiff as owner of the mansion-house and grounds in question? Secondly, if it is so, does it come from the defendants' works. I think that the state of things, so far as regards this part of the case, was not substantially altered by the defendants' works.

"I think we have it admitted by the plaintiff himself, that both the Brandon and Browney collieries send smoke, and, I take it, no inconsiderable portion of smoke, over his property. I am quite satisfied that some of this smoke in the valley which produces this feeling of discomfort, dissatisfaction or annoyance, and some considerable portion of it is to be attributed to those other collieries. When I say smoke, of course I allude to the black or colored smoke, as distinguished from light or grey smoke. Therefore, if I was asked for an injunction on this ground only, I should certainly refuse it. But the solicitor-general has not ventured to ask it on this ground. What he has relied upon is this—and really the whole contest in the case has been upon this point—does, or does not, the emanation of sulphurous or sulphuric acid from the coke ovens in question seriously injure and damage the trees of the plaintiff, the herbage of the plaintiff, the fruit-trees and other vegetable productions of the plaintiff, either in his garden or in the wards which are in the neighborhood of the house, and which, no doubt, are of importance, as regards the amenities of the house.

"As regards the house and garden, the state of affairs is this: The house is surrounded by collieries; they are extremely numerous. Any one who looks at the map of the district, and sees the way that these collieries are placed, must see at once that the plaintiff's estate is situate in an atmosphere loaded with coal smoke. That, I may say, is the evidence on both sides. Indeed, upon that point, the plaintiff's own evidence is very strong. He

tells us, speaking of this very property, what sort of a country he is living in. Of course, there cannot be better evidence against him than his own, when it is in the shape of an admission; and what he says is, 'I should say there were sufficient collieries to call it a black country, though we have not yet given it that name.' So that it is clear that this is a case in which pure atmosphere cannot be expected, and where, if you take away Littleburn colliery—the subject of this suit—there would still be an atmosphere very impure, and so charged with smoke at various times as to produce, as it certainly *does* produce, a very sensible effect in blackening the trees. The next point to consider is, whether the Littleburn colliery (the defendants' works) has changed the state of the country in that respect, or has introduced a new state of things. As regards black coal smoke, I must say I have no doubt it did not. In the first place, the quantity of black smoke before was very considerable, so considerable, as described by the plaintiff, as to be very troublesome to him; and so it is also described by a great number of witnesses, who knew the place for years, and who have been called by the defendants—oddly enough, not by the plaintiff. They say that the place is no worse now than it was many years ago. They are not one witness or two, but six or seven, who have known the place for a very long time, who have been employed upon it as gardeners and other offices about the house and grounds, and knew it well, and who all agree that the state of blackness, the state of smokiness of the place and grounds, is very much the same now as it has been for a great number of years. On the other hand, we have really nothing which can be called contradictory evidence, and I am of the opinion that the addition to the quantity of black smoke—for there is some black smoke in some considerable quantities at times from the Littleburn colliery—has not produced that alteration in the state of things, which previously existed, which would warrant this court in interfering on behalf of the plaintiff. Whether if none of the other collieries had ever existed the Littleburn colliery would alone have produced that state of the atmosphere is a question I am not now called upon to decide; but I think upon the evidence it would not, even had the atmosphere been pure. The quantity of black smoke, which appears

reduced to a *minimum*, issuing from that colliery would not have been sufficient for that purpose. It only remains to consider the real and most important point, and the most contested question in the case. Do the gaseous emanations, not being black smoke, which arise from the colliery, including in that expression any acid, injure the trees in a *substantial* manner, so as to entitle the plaintiff, if he had brought an action, to substantial damages? I must say that I think the plaintiff has come here before that damage is sustained. I am not sufficiently acquainted with the science of botany and chemistry to be able to say whether the damage will ever be sustained, but I have great doubts about that.

“For these reasons, I think the plaintiff has not made out his case, and that is, he comes here strictly upon *legal* grounds, to ask for an injunction upon the ground of substantial injury, the only course I can take is to dismiss the bill.”

In the court of appeals, in affirming the judgment of the master of the rolls, Lord Justice JAMES said: “The term *visible* was very much quarreled about before us as not being an accurate statement of the law. It was said that the word used in the judgment of the house of lords¹ was ‘sensible.’ I do not think there is much distinction between the two words. When the master of the rolls said the damage must be *visible*, it appears to me that he was quite right, and, as I understand it, it amounts to this: That although when you once establish the fact of actual, substantial damage, it is quite right and legitimate to have recourse to scientific evidence upon the question of the *causes* to which the damage is to be referred; yet, if you are obliged to *start* with scientific evidence, such as that procured by the microscope or chemical tests, for the purpose of establishing the damage itself, that will not suffice. It must be an actual damage, capable of being shown by a plain witness to a common juryman. The damage must also be *substantial*, and it must be, in my view, actual; that is to say, the court has no right whatever in dealing with questions of this kind, to have reference to *contingent*, *prospective* or *remote* damages.”

¹ *Tipping v. St. Helen Smelting Co.*, 11 H. L. Cas. 642.

SEC. 474. The doctrine of this case must commend itself to courts dealing with this class of wrongs, where the ground of complaint is injury to property itself. It is not only predicated upon sound common sense, but is strictly just and equitable, and is well sustained in principle by nearly all the leading cases in which the question has been raised. There are a large class of injuries resulting from the violation of a right, where the rule does not apply, and was not intended by the court to have application. When the right is clear, and the violation of it clear also, the court will protect the right even though the damage is merely nominal.¹ So where the action is for discomfort arising from an impregnation of the atmosphere with smoke, noxious vapors or noisome smells, no actual pecuniary damage need be shown. If the impregnation is so extensive as to produce discomfort, the law will import damage to sustain the right;² but when the injury complained of is an injury to *property itself*, it is not enough that *some* damage results, but there must be *actual, substantial* damage to warrant the interference either of a court of law or equity, in outlawing and suppressing a lawful trade.³ And that rule which requires that the damage should be of a *sensible, visible, tangible* character, discernible to a common observer and in no sense dependent upon scientific tests to discover, is clearly right, and calculated to secure the best interests of society.

SEC. 475. Vapors arising from artificial causes that are destructive to vegetable life, create a nuisance, even though no other ill results ensue therefrom, and it makes no difference that the vegetation affected is of a delicate order, nor that it is not a natural product of the soil or climate in which it is grown.⁴ If it is a product of the soil, the fact that it is of foreign origin, and that it requires a pure atmosphere and careful culture, does not, in any measure, operate as a defense for the exercise of a trade in the vicinity that develops vapors deleterious to its life, even though the vapors do not operate deleteri-

¹ Ashby v. White, 2 Ld. Raym. 1028; Attorney-General v. Cambridge Gas Co., 6 L. R. Eq. Ca. 292.

² Walter v. Self, 4 Eng. Law & Eq. 20; Ross v. Butler, 19 N. J. 274; Cleaveland v. Gas Co., 20 id. 201.

³ Cleaveland v. Gas Co., 5 C. E. Green (N.J.), 201; Wolcott v. Mellick, 3 Stockt. (N. J.) 204; Cartwright v. Gray, 12 Grant's Ch. Cas. (Ont.) 400.

⁴ Cooke v. Forbes, 5 L. R. (Eq. Ca.) 166.

ously upon ordinary vegetation.¹ Every man has a right to cultivate upon his land such products as he chooses, and is not bound to consult the interests or tastes of his neighbor, and he has a right to an atmosphere free from artificial impurities, that are deleterious thereto, even though his injuries are in no wise commensurate with the loss to the proprietor of the works that produce the deleterious results.² But the damage must be shown to result from the vapors discharged from the works of the person sought to be made liable for the nuisance, and the burden of proving this is always upon the plaintiff. The rule is, that he who seeks to recover damages resulting from a nuisance, not only takes the burden upon himself of proving the nuisance, but also of proving that it was produced by the defendant or his agents or tenants in such a way that a legal liability rests upon him to respond to the plaintiff in damages therefor.³

SEC. 476. If the trade complained of is a *prima facie* nuisance, or if it is a trade whose results by experience have been demonstrated to be hurtful to animal or vegetable life, or to the comfortable enjoyment of human life, as works for smelting copper,⁴ lead,⁵ or works employing mineral coal for fuel,⁶ or chemical works for the manufacture of oil of vitriol,⁷ or any other article that imparts noxious substances to the atmosphere,⁸ or works that are known to emit deleterious dust, gases or vapors,⁹ less evidence will be required to establish the fact of nuisance, than in reference to works where noxious results are not the necessary or natural consequence of the trade or use of property.¹⁰

SEC. 477. In *Campbell v. Seamen*, 2 N. Y. Sup. Ct. Rep. (Pars. Ed.) 231, the defendant was restrained from the use of

¹ Broadbent v. Imperial Gas Co., 7 De G. M. & G. 436; *Salvin v. North Brancepeth Coal Co.*, 31 L. T. (N. S.) 154.

² *Millar v. Marshall*, 5 Mur. (Sc.) 28; *Broadbent v. Imperial Gas Co.*, 7 De G. M. & G. 436; *Cooke v. Forbes*, 5 L. R. (Eq. Ca.) 166.

³ *Rex v. Williams*, 6 Car. & Payne, 608; *Oldaker v. Hunt*, 19 Beavan, 485.

⁴ *Bankhardt v. Houghton*, 27 Beavan; *Tennant v. Hamilton*, 7 Cl. & F. 122.

⁵ 2 Rolfe's Abr. 140; *Tipping v. St. Helen Smelting Co.*, 6 B. & S. 608; 11 H. L. Ca. 642.

⁶ *Campbell v. Seamen*, 2 N. Y. Sup. (Pars. Ed.) 231.

⁷ *Rex v. Ward*, 1 Burrows, 333.

⁸ *Rex v. Niel*, 2 C. & P. 48; *Hutchins v. Smith*, 63 Barb. (N. Y. S. C.) 252.

⁹ *Cooper v. N. B. R. R. Co.*, 36 Jurist, 169; 2 Macph. 117.

¹⁰ *Salvin v. North Brancepeth Coal Co.*, 31 L. T. (N. S.) 154.

mineral coal in the burning of brick near the plaintiff's premises, because the vapors created thereby injured the trees and vegetation upon the plaintiff's land.¹

The plaintiffs were the owners of improved grounds and a dwelling-house in the vicinity of the kiln. They had set out ornamental shade trees upon these grounds, and also had grape vines and fruit trees growing in their garden. The defendant had for two or three years been manufacturing bricks upon his premises adjoining. In the manufacture of the brick he mixed anthracite coal dust with the clay and sand in molding his brick, and in constructing the kiln a portion of the brick were left out, and the space filled with this coal dust. In the process of burning, this coal dust would become ignited, and furnish the requisite heat for the burning of the brick in the outer edges of the kiln. The result of this use of the coal dust, was the emission of sulphurous acid gases, which flowed over the premises of the plaintiffs, destroying many of the trees and seriously injuring the vegetation there growing.

The proof as to the destructive effects of these gases upon vegetation, was indisputable, particularly upon the plaintiff's property, and it was also shown that they were poisonous, and extremely injurious to animal life, but whether they, in any measure, impaired the comfortable enjoyment of the plaintiff's dwelling, the case does not disclose. The court held upon these facts, that the use of this species of fuel in this way was a nuisance, and perpetually enjoined the defendant from its use. This case in many of its features, is similar to the case of *Saville v. Killner*, 26 L. T. (N. S.) 277, which was an application to restrain the defendant from carrying on his glass works in the vicinity of the plaintiff's premises, because of the emission of poisonous vapors therefrom, that destroyed the shrubbery and vegetation upon the plaintiff's premises. The defendants' works were erected in 1845 and from that time down to 1863, additions

¹ In *Richard v. Phenix Iron Co.*, 7 Am. Law Reg. (N. S.) 356; 57 Penn. St. 105, it was held that equity would not enjoin the use of a particular species of fuel when it was essential to the carrying on of a useful business, and when the fuel was such as is ordinarily used in similar establishments, but would

leave the parties to their remedy at law. But the soundness of the doctrine of this case may well be questioned, in view of the facts before the court, and in view of the almost unbroken line of decisions to the contrary, both in this country and in England.

were from time to time made to the number of chimneys employed, until in the latter year there were seven in full operation. In 1870, the plaintiff brought his bill to enjoin the works upon the ground of nuisance to his premises. The defendants insisted that the plaintiff was estopped from maintaining an action for a nuisance, because of his delay in making complaint, and claimed that they had acquired a right as against the plaintiff to corrupt the air. But the court held that this defense could not prevail, for it did not appear that when the works were first established, any nuisance was created. No damage was done to the plaintiff's property by the vapors from the works until the year 1869, and *then* the nuisance arose.

The defendants also insisted that they ought not to be enjoined because there were other similar nuisances in the vicinity, and the plaintiff's property would be damaged by those, even if their works were closed. But the court held that the fact that other similar works existed in the vicinity, that contributed to the injury, afforded no defense for the maintenance of the defendants' works. That one nuisance could not be set up as an excuse for another.

The defendants insisted that the plaintiff, by making another and different use of his land, could derive as much profit therefrom as he was then deriving, and that their works would not interfere with such use of the land. But the court said that the plaintiff had a right to use his premises for any purpose he saw fit, so long as his use thereof was reasonable, in view of the rights of others, and that he was not bound to consult either the tastes, convenience or profit of his neighbor in such use, and that if he saw fit to use his premises for a purpose that was inconsistent with the exercise, by the defendants, of their trade, because of the injurious results thereon, he had a right to do so, and the court could not be influenced by the fact, that if they were enjoined, their works could not go on.

In this case, in addition to the fact that the vapors and smoke issuing from the defendant's works were injurious to vegetation, it appeared that the gases were poisonous and left a disagreeable taste in the mouths of persons breathing them. In reference to this branch of the case the court said, "no man has a right to interfere with the supply of pure air that flows over another's

land, any more than he has to interfere with the soil itself. * * * When the air is so corrupted that, in breathing it, it leaves bad tastes in the mouths of persons, this, of itself, is a sufficient nuisance."

SEC. 478. In the case of noxious vapors, as with smoke, they create a nuisance whenever they produce injury to any class of property belonging to another, or when they render the enjoyment of property within the sphere of their operations, physically uncomfortable.¹ Vapors that injure buildings by producing discoloration,² or that are pregnant with dust that settles upon the premises or enters the dwellings of others, producing annoyance and damage,³ or that are charged with elements that are in any wise deleterious or annoying even to those who inhale them,⁴ or that are charged with stench that are offensive to the senses,⁵ or that are injurious to any species of property, however delicate in character or quality,⁶ or which, by reason of their noxious qualities, are in any wise substantially injurious to the property, health or comfort of those within their sphere, create an actionable nuisance."

SEC. 479. The fact that the defendant was not aware of the noxious results of his trade, is no defense, and furnishes no excuse for its exercise. If in point of fact it is productive of ill results, it is a nuisance, and the fact that similar establishments exist in populous localities that have never been the subject of complaint, does not, in any measure, serve to protect him from the consequences, if his establishment proves a nuisance.⁷ The question is one of results.⁸ Even a business that has been regarded as a nuisance *per se* may be so conducted in a populous locality as not to be a nuisance,⁹ while a business lawful in itself, and which has never been regarded as noxious or injurious in its results, may

¹ Roberts v. Clarke, 17 L. T. (N. S.) 384.

² Cooke v. Forbes, 5 L. R. Eq. Ca. 166. Discoloration of cocoanut fibers hung out to dry. Cooper v. North British Railroad Co., 35 Jur. 169. Injury to houses by discoloration. Cartwright v. Gray, 12 Grant's Ch. Ca. Ont.) 400. Discoloration of linen.

³ Id.; Hutchins v. Smith, 63 Barb. (N. Y. S. C.) 252.

⁴ Saville v. Killner, 26 L. T. (N. S.)

277; Hutchins v. Smith, *ante*; Walter v. Selfe, 4 Eng. L. & Eq. 15.

⁵ Rex v. Niel, 2 C. & P. 485.

⁶ Cooke v. Forbes, 5 L. R. Eq. Ca. 166.

⁷ Tipping v. St. Helen Smelting Co. 11 H. L. Cas. 642.

⁸ Rex v. Niel, 2 C. & P. 485.

⁹ Tipping v. St. Helen Smelting Co. 11 H. L. Cas. 642.

¹⁰ Du Bois v. Budlong, 10 Bos. (N. Y. S. C.) 700.

be so conducted as to become a nuisance of the worst character.¹ In determining the question of nuisance, the first and important question is, is the use of the property complained of productive of injurious results to the party seeking relief? If so, the nuisance is established, and liability attaches for all the consequences unless the injury results from an ordinary use of property, and without the fault of the owner or the person sought to be charged.²

SEC. 480. The fact that the locality is given up to works producing similar results, does not relieve one from liability if definite injury results from his works, and is clearly traceable thereto,³ for no place is a *convenient* place, for a noxious trade, if located where it produces actual injury to another.⁴ If other nuisances exist of a similar character to the one complained of, yet, if the works complained of *sensibly* add to the nuisance, *increase* the injury, and are clearly productive of damage to an extent that did not exist before, they are a nuisance, and actionable as such at law, and a court of equity will restrain their operations to the extent necessary to relieve the party injured from the damage thereby inflicted. Neither is it a defense that the property of the plaintiff, injury to which is complained of, is in part devoted to uses that are also nuisances.⁵

SEC. 481. In *McKeon v. See*, referred to in the previous note, ROBERTSON, Ch. J., in discussing this question, says, "The defendant undertook to show that the whole vicinity was of such an inferior character, such a nest of nuisances, that one more or less would not affect it; and that even the plaintiff herself, before she had sustained any injury from the defendant's acts, had converted her own premises into one. Certain occupations, trades or

¹ *Pickard v. Collins*, 23 Barb. (N. Y. S. C.) 444.

² *Pinckney v. Ewing*, 4 L. T. (N. S.) 365.

³ *Pickard v. Collins*, ante; *Mohr v. Gault*, Wis.

⁴ *Crossly & Sons v. Lightolwer*, 4 L. R. Eq. Ca. 279; *Peck v. Elder*, 3 Sandf. (N. Y. S. C.) 126; *McKeon v. See*, 4 Robt. (N. Y. S. C.) 469; *Rex v. Niel*, 2 C. & P. 485; *People v. Mallory*, 4 N. Y. Sup. Ct. 567; *Charity v. Riddle*, 14 F.

C. (Sc.) 237; *Tipping v. St. Helen Smelting Co.*, 11 H. L. C. 642; *Milligan v. Elias*, 12 Abb. Pr. (N. Y.) 259; *Downie v. Oliphant*, 17 F. C. 491; *Walter v. Selge*, 4 Eng. Law & Eq. 20.

⁵ *Tipping v. St. Helen Smelting Co.*, 4 B. & S. 608; 116 E. C. L. 608; 11 H. S. C. 642.

⁶ *McKeon v. See*, 4 Robt. (N. Y. S. C.) 469. But see *Gilbert v. Showerman*, 23 Mich. 448; *Doellner v. Tynan*, 36 How. Pr. (N. Y.) 176; *Robinson v. Baugh*, 31 Mich. 280.

manufactures may become a nuisance in a populous city, that would not be so in the country, or among a scattered population. *But I know of no principle which outlaws premises upon which a nuisance exists, so as to prevent the owner from being protected against other nuisances on other premises.*" The soundness of this doctrine is apparent. If A erects chemical works upon his lands adjoining the lands of B, which emit dense volumes of smoke, can B also erect similar works upon his premises and productive of similar results, with chimneys so arranged that the smoke escaping therefrom enters the works of A, to the damage of his property or its comfortable enjoyment, and justify in an action for damages, upon the ground that A's works emit an equal quantity of smoke with his own? Most clearly not. It is not the mere production of smoke or noxious vapors that makes a nuisance, but the production of them in such quantities, and discharging them in such a manner as to produce injurious results to others. There can be no offset of one tort against another, and the fact that the party complaining of a tortious act committed *by* B, has also been guilty of a tort *against* B, will not excuse B from liability to A, neither will B's tort excuse A from his liability to B. But, while this is the rule in a court of law, in equity, a nuisance will not be restrained at the suit of one who is himself guilty of a *similar* nuisance, unless he shows that the injury is clear and unmistakable, and the result of a want of care or skill on the part of the owner, and is not properly compensable in damages by a suit at law.¹

SEC. 482. While it is true that the fact that nuisances existed in the neighborhood before the plaintiff came there, is no defense either in law or equity to an action for damages resulting from a nuisance, or to restrain its continuance,² yet, if the plaintiff erects buildings there which are in part devoted to business purposes which are productive of results similar to those produced by other works in the vicinity, he does not by also occupying a part of his building as a *dwelling*, acquire any superior right over the other

¹ Richards v. Phenix Iron Co., 57 70 Penn. St. 103; Wolcott v. Mellick, Penn. St. 105; Gilbert v. Showerman, 3 Stockt. (N. J.) 204.
² St. Helen Smelting Co. v. Tipping, 23 Mich. 448; Huckenstine's Appeal, 1 L. R. Ch. App. 66.

works so long as they are properly conducted in the usual and ordinary way, which will entitle him to the interposition of a court of equity to restrain their operations, until his right has first been established at law.¹ Nor will a court of equity, under such circumstances, interfere by injunction as a matter of course, even after verdict, unless the injury is of such a character, and the equities are so strong as to leave no doubt of the justice of such a remedy. In *Luscombe v. Steere*,² the court held that "a verdict at law is not necessarily such an establishment of the right or damage as entitles a party to an injunction. In order to warrant that remedy even after verdict, there must be material damage and great mischief shown to result from the nuisance."

In *Broadbent v. Imperial Gas-light Co.*, heard in the House of Lords, this question was discussed, and it was held that while a verdict at law generally was such an establishment of the party's right as entitled him to a perpetual injunction, yet, that this is not necessarily the case, where the damages are trifling, or where the obvious equities of the case do not warrant the remedy.

SEC. 483. In determining the right of a party to an injunction, after a verdict in his favor by a court of law, the court will consider the relative loss to either party, the character of the property for which protection is sought, the character of the locality in which the nuisance exists, and whether the injury is properly compensable in damages.³ In the language of SWAYNE, J., in *Parker v. Winnipiseogee Lake Cotton and Woolen Co.*:⁴ "After the right has been established at law, a court of chancery will not, *as of course*, interpose by injunction. It will consider all the circumstances, the consequences of such action, and the *real equity* of the case."

The rule is, that even though the damage is small, merely nominal, yet if the injury is of a *continuous* nature, so as to operate as a constantly recurring grievance, the courts will re-

¹ *Gilbert v. Showerman*, 23 Mich. 448; *Doellner v. Tynan*, 38 How. Pr. (N. Y.) 176; *Richards v. Phenix Iron Co.*, 57 Penn. St. 105; *Huckenstine's Appeal*, 70 Penn. St. 102.

² *Luscombe v. Steere*, 17 L. T. (N. S.) 229; *Broadbent v. Imperial Gas Co.*, 7 De Gex, M. & G. 436; *Parker v. Winnipiseogee Lake Cotton and Woolen*

Co., 2 Black (U. S.) 545; *Curtis v. Winslow*, 38 Vt. 690; *Wolcott v. Mellick*, 3 Stockt. (N. J.) 204; *Sutcliffe v. Wood*, 86 Eng. Law & Eq. 217.

³ *Curtis v. Winslow*, 38 Vt. 690; *Sprague v. Rhodes*, 4 R. I. 301.

⁴ *Parker v. Winnipiseogee Lake Cotton and Woolen Co.*, 2 Black. (U. S.) 553.

strain it, to avoid a multiplicity of actions;¹ but, if the damage is small, and the injury only occasional, *accidental*, rather than a probable and necessary consequence, an injunction will be denied.² Necessarily, each case must be governed by the circumstances that surround it, and by the relative equities. The value of the property affected by the nuisance on the one hand, and the value of the property to be affected by the injunction on the other, may be considered, but they are not necessarily to influence the result.³ If there is a clear violation of a right, and the injury is of a continuous nature, an injunction, at least after a verdict at law, becomes almost a matter of right, irrespective of the interests to be affected thereby.⁴ The instances where it has been refused are infrequent, and are cases where the obvious equities rendered the granting of it unjust.⁵ In *Sutcliffe v. Wood*, which was an action for an injunction to restrain the defendants from discharging the refuse from their dye-works into the Bowling Beck to the damage of the plaintiff's works, it appeared that the plaintiff had brought an action at law and obtained a verdict against the defendant for the injury, thus establishing his right and the nuisance.

KINDERSLEY, V. C., in passing upon the question whether the verdict at law established the plaintiffs' right to an injunction, said: "If the plaintiffs have established their legal right, and,

¹ *Corning v. Troy Iron and Nail Factory*, 40 N. Y. 191; *Sutcliffe v. Wood*, 8 Eng. Law & Eq. 217; *Coulson v. White*, 3 Atk. 21; *Wood v. Waud*, 13 Jur. 472; *Attorney-General v. Nichol*, 16 Vesey, 338; *Elmhirst v. Spencer*, 2 Mac. & G. 45; *Ripon v. Hobart*, 8 M. & K. 178; *Parker v. Lake Co.*, 2 Black. (U. S.) 545; *Norris v. Hill*, 1 Mann, 202; *Clark v. White*, 2 Swan (Tenn.), 540; *Milhan v. Sharp*, 28 Barb. (N. Y.) 228; *Bemis v. Upham*, 13 Pick. (Mass.) 171; *Hayden v. Tucker*, 37 Mo. 214; *Wilson v. Townsend*, 1 Dr. & Sm. 327; *Attorney-General v. Sheffield Gas Co.*, 3 D. M. & G. 319; *Carlisle v. Cooper*, 6 C. E. Green (N. J.), 576; *Holsman v. Boiling Spring Co.*, 14 N. J. 335; *Elliott v. N. E. R. R. Co.*, 1 J. & H. 156, the court will interfere to enjoin a threatened nuisance when the fact of nuisance is clearly established. The court will look to all the consequences that have ensued from

the nuisance, and to those which will probably ensue. *Goldsmid v. Tunbridge Wells Co.*, 1 L. R. Ch. App. 349.

² *Sutcliffe v. Wood*, 8 Eng. Law & Eq. 217.

³ *Holsman v. Boiling Spring Bleaching Co.*, 14 N. J. 335.

⁴ *Embrey v. Owen*, 6 Exch. 353; *Canal Co. v. King*, 14 Q. B. 122.

⁵ *Luscombe v. Steere*, 14 L. T. (N. S.) 229; *Broadbent v. Imperial Gas Co.*, 7 De G. M. & G. 436. If the injury complained of be to the *primary* use of water, the law will imply *substantial* damage even though the actual pecuniary damage is small. *Goldsmid v. Tunbridge Wells Improvement Co.*, 1 L. R. Ch. App. 349. But if the injury is to the *secondary* use of water, substantial damage must be proved. *Elmhirst v. Spencer*, 2 M. & G. 45; *Lingwood v. Stowmarket Co.*, 1 L. R. Eq. Cas. 77; *U. M. M. Co. v. Dangberg*, 2 Sawyer (U. S. C. C.), 450.

while they are in the enjoyment of that right, another person comes and erects machinery or any manufacturing works on that same stream above the plaintiffs' works, and by his manufacturing process so fouls the water as that, instead of coming as before, pure and unsullied, to the plaintiffs' works, it arrives there in a less pure and serviceable state, so as *seriously* and *continuously* to obstruct the effective carrying on of the plaintiffs' manufacture, and if the injunction will restore, or *tend* to restore, the plaintiffs in a position in which they have a right to stand, and in which they stood before; and if the injury which is occasioned by the works complained of is of such a nature that the recovery of pecuniary damages would not afford an adequate compensation; and if the plaintiffs have not slept upon their rights, and have not acquiesced, either actively or passively, in the acts which they now complain of, but have used due diligence and vigilance to take such steps as are proper and necessary to vindicate their rights, I think, as a general rule, the plaintiffs would have a right to come to a court of equity and say, 'do not put us to bring action after action for the purpose of recovering damages, but interpose by a strong hand and prevent the continuance of those acts altogether, in order that our legal rights may be protected and secured to us;' I say as a general rule and principle, because it must not be forgotten, that of necessity, whenever a court of equity is called on for an injunction in cases of this nature, it must have regard, not only to the dry, strict rights of the parties, but must have regard to the surrounding circumstances, to the rights and interest of other parties more or less involved in it.

* * * I am far from saying that, because in the action at law the court of law and a jury have only given a shilling, or a *farthing* damages, that the injury is not serious, and that it may not be a cause for granting an injunction. I have also used the term '*continuous injury*.' By *continuous* I do not mean never ceasing, but recurring at repeated intervals, so as to be of repeated occurrence, and so as to be of the same sort of damnification, as an actual continuous mischief would be.

* * * Another ground for granting or refusing an injunction in favor of one in whom the legal right exists, is whether he will thereby be restored to the right he has established as against the defendant."

This is the rule as between parties when the injury to water is to its *secondary* use. As between those, where the injury complained of is to the *primary* use, applying the doctrine of this case, as well as of all the cases, it is evident that a verdict at law, establishing the right, would, if the injury is of a continuous nature, entitle the party in whom the right exists, to an injunction, even though the damages were merely nominal.¹

SEC. 484. But, while it is true that a person, by devoting his property to uses that are in law regarded as a nuisance, may thereby be estopped from proceeding to abate another *similar* nuisance in the same locality which is properly conducted; yet, the mere fact that his property is so used, will not operate as a defense, where the injury results from an improper or unskillful prosecution of the business in the same locality, by another;² nor will it operate as a defense in an action against a person carrying on a nuisance of a different character, whereby his property is injured, or the proper prosecution of his business is impaired.³

SEC. 485. There can be no excuse for an actual nuisance.⁴ The lawfulness of the trade,⁵ its usefulness,⁶ its actual necessity even, affords no excuse, and is in no measure a defense. The fact that the best appliances and methods known to science have been adopted, or that the highest degree of care and skill has been exercised in carrying it on, is no defense; if actual injury ensues, the works are a nuisance, and must yield to the superior rights of others.⁷

¹ *Holsman v. Boiling Springs Co.*, 14 N. J. 335; *Goldsmid v. Tunbridge Wells Co.*, 1 L. R. Ch. App. 349; *Stockport Water Works Co. v. Potter*, 7 H. & N. 160; *Spokes v. Banbury Board*, 1 L. R. Eq. Cas. 42; *Canal Co. v. King*, 16 Beav. 630. Where the nuisance complained of is an injury to a natural right, as to the air or to water, by corrupting the same, an injunction will issue, although the actual damage is merely nominal. *Casebeer v. Mowrey*, 55 Penn. St. 419; *Coulson v. White*, 3 Atk. 21; *Walter v. Selfe*, 4 Eng. Law & Eq. 20; *Bamford v. Turnley*, 3 B. & S. 62; *St. Helen Smelting Co. v. Tipping*, 11 H. L. Cas. 642; *Crump v.*

Lambert, 3 L. R. Eq. Cas. 409; *Cooke v. Forbes* 5 id. 166; *Rhodes v. Dunbar*, 57 Penn. St. 274.

² *Gilbert v. Showerman*, 23 Mich. 448.

³ *Doellner v. Tynan*, 38 How. Pr. (N. Y.) 176; *Cooke v. Forbes*, 5 L. R. Eq. Cas. 166.

⁴ *McKeon v. See*, 4 Robt. (N. Y. S. C.) 469; *Cooke v. Forbes*, 5 L. R. Eq. Cas. 166.

⁵ *Poynton v. Gill*, 2 Rolle's Abr. 140.

⁶ *Attorney-General v. Colney Hatch Lunatic Asylum*, 4 L. R. Ch. App. 147.

⁷ *Fletcher v. Rylands*, 3 L. R. (H. L. Cas.) 330; *Cahill v. Eastman*, 18 Minn. 324; 10 Am. Rep. 184. In *Chute v. State*, 19 Minn. 271, evidence that the defendant consulted competent builders was held not admissible. The question is simply, is the building a nuisance.

SEC. 486. The question of care and skill, and the employment of the best and most improved appliances, only becomes material when the works have been authorized by the legislature. In all other instances, it is of no avail, and is not properly admissible in evidence, except where other than actual damages are claimed,¹ or when the trade is carried on in a convenient place.²

SEC. 487. Not only are those trades which produce noxious vapors that injuriously affect the atmosphere floating over another's premises nuisances, but any use of property whereby, by artificial means, noxious gases or vapors are developed, whether for the purposes of trade or not, are equally so. The collection of water in artificial ponds or trenches, or the setting back of water by means of dams or other artificial devices, whereby the water becomes stagnant and emits unpleasant odors, or unwholesome or injurious gases, is as great a nuisance, and equally as actionable or indictable, as are furnaces for the smelting of lead, copper, or other substances that send out destructive or injurious vapors.³

It was held in the case of *Green v. The Mayor of Savannah*, 6 Ga. 1, that the city government of Savannah, being authorized by its charter to regulate nuisances within its limits, had the power to prevent the cultivation of rice within the city limits, it being a branch of agriculture injurious to the health of the city, by reason of the unwholesome gases developed and imparted to the atmosphere from the stagnant water essential to its cultivation.

SEC. 488. The law does not balance conveniences, nor recognize the relative difference in damage, between the injury to the rights of others on the one hand, and the damage and loss which will be entailed upon the person who, by the use of his property

¹ *Fletcher v. Ryland*, 1 L. R. Exch. 284; *Tremain v. Cohoes Co.*, 2 N. Y. 169.

² *Dollner v. Tynan*, 38 How. Pr. (N. Y.) 176; *Gilbert v. Showerman*, 23 Mich. 448.

³ *Neal v. Henry, Meigs* (Tenn.), 17; *Bigelow v. Newell*, 10 Pick. (Mass.) 348; *Day v. State*, 4 Wis. 387; *Weeks*

v. Milwaukie, 10 id. 242; *Smith v. Milwaukie*, 18 id. 63; *Rooker v. Perkins*, 14 id. 79; *Lanning v. State*, 1 Chand. (Wis.) 178; *Stoughton v. State*, 5 Wis. 291; *Commonwealth v. Webb*, 6 Rand. (Va.) 726; *Spencer v. Commonwealth* 2 Leigh (Va.), 759; *Miller v. Trueheart*, 4 id. 569.

in a particular manner, violates those rights, by having his works declared a nuisance, and being compelled to remove them on the other. The fact that the injury is slight, is no excuse or defense; if a right is clearly violated, the works producing them are nuisances, and must yield to the superior right. It makes no difference that the works are really in the interests of society, and necessary for the preservation of the health of a community, if they are of that noxious character, or produce those noxious results that bring them within the idea of a nuisance, the person maintaining them is liable for all damages resulting to individuals specially injured thereby, and to indictment as for a public nuisance where the location of the works and their effects are such as to injure the public.¹

Thus, in the case of *The Attorney-General v. Leeds*, 39 L. J. 354, the town of Leeds was indicted for a public nuisance created by discharging the sewage of the town into a river, and thereby polluting and corrupting the water of the stream. The defendants insisted that the discharge of the sewage into the river in question was the only practicable method by which the town could be drained, and that the preservation of the health of the town in a great measure depended upon the sewage being discharged there. But the court held that this was no defense. That in prosecutions or actions for nuisances, the court would not balance conveniences; but, when the right and its violation was clear, there could be no excuse urged, that would protect the person or corporation that produced the injury from all the consequences, civil or criminal.

SEC. 489. The question as to what is a convenient place for the exercise of a noxious trade is to be determined by the single test, whether it is prosecuted in a locality where no injurious results ensue to others. If injurious consequences to others do in fact ensue therefrom which amount to an actionable injury, the place

¹ *Attorney-General v. Colney Hatch Lunatic Asylum*, 4 L. R. Ch. App. 146; *Poynton v. Gill*, 1 Rolle's Abr. 140; *Holsman v. Boiling Springs Co.*, 14 N. J. 335; *Bamford v. Turnley*, 3 B. & S. 62; *Beardmore v. Treadwell*, 3 Giff. 683; *Attorney-General v. Leeds*, 39 L. J. 354; *Roberts v. Clark*, 17 L. T. 194; (N. S.) 79; *Broadbent v. Imperial Gas Co.*, 7 De G. M. & G. 436; *Respublica v. Cauldwell*, 1 Dallas (U. S.), 160; *Rex v. Ward*, 4 Ad. & El. 385; *Rex v. Morris*, 1 B. & Ad. 441; *Rex v. Grosvenor*, 2 Starkie, 511; *Folkes v. Chad*, 3 Doug. 340; *The King v. Dewsnap*, 16 East 194.

is not a *convenient* place, and the works are a nuisance.¹ In the language of Justice MELLOR, in his charge to the jury, in *Tipping v. St. Helen Smelting Co.*, 11 H. L. Cas. 642, "A man may do any act on his own land which is not unlawful. When I say unlawful, I mean any act which is not wrong. He may erect a lime kiln if it is in a *convenient* place, but the meaning of a *convenient place* is, that it must be in a place where he will not do an actionable injury to another, because a man may not so use his own property as to injure another. When he sends on to the lands of his neighbor noxious smells, smoke, etc., then he is not doing an act on his own property only, but he is doing an act on his own property also; because every man has a right, by the common law, to the pure air and to have no noxious smells sent on his land, unless by a period of time a man has, by what is called a prescriptive right, obtained the power of throwing a burden on his neighbor's property. * * * If a man, by an act, either by the erection of a lime kiln,² or copper works,³ or any works of that description, sends over his neighbor's land, that which is noxious and hurtful to an extent which sensibly diminishes the comfort and value of the property, and the comfort of existence of that property, that is an actionable injury. That is the law. But when you come to the question of facts, there is no doubt you must take into consideration a variety of circumstances. In deciding whether or not a man's property has been sensibly injured by the actions of another person on his own land, of course you will consider the place, the circumstances, and the whole nature of the thing. It would not be sufficient to say that noxious vapors have come on the land of another, but you must consider to what degree, and to what extent they have come, and whether they have come from the premises of the defendant. * * * Whether a nuisance has been caused by the defendants

¹ *Pinckney v. Ewens*, 3 L. T. (N. S.) 741; *Stockport Waterworks Co. v. Potter*, 7 H. & N. 167; *Tipping v. St. Helen Smelting Co.*, 11 H. L. Cas. 642.

² *Aldred's Case*, 5 Coke, 58; *Hutchins v. Smith*, 63 Barb. (N. Y. S. C.); *Ric de D. v. R. & S.*, 4 Assize Book, pl. 3, p. 6.

³ *Tennant v. Hamilton*, 7 Cr. F. 122; *Bankhardt v. Houghton*, 27 Beavan, 425; *Houghton v. Bankhardt*, 3 L. T.

(N. S.) 266; *Rex v. Williams*, 6 C. & P. 686; *Stockport Water Works Co. v. Potter*, 7 H. & N. 167; *Beardmore v. Treadwell*, 3 Giff. 683; *Barwell v. Brooks*, 1 L. J. 75; *Broadbent v. Imperial Gas Co.*, 7 D. M. & G. 436; *Bamford v. Turnley*, 3 B. & S. 62; *Roberts v. Clark*, 17 L. T. (N. S.) 79; *Cleveland v. Gas Co.*, 5 C. E. Green (N. J.), 294.

at all, the nature of the locality, the character of the works, and every other fact in the case, must be taken into consideration, and so ERLE, Ch. J., says, in a case which has been handed up to me. 'The time, the locality and so on, are all circumstances to be taken into consideration upon the question of fact, whether an actionable injury has been occasioned by a man to his neighbor or not.'"

The question as to what is a convenient place, is a mixed question of law and fact. If no damage ensues in consequence of the works, then the place is a convenient one, but if damage ensues then the place is not convenient, and the only question for the jury, is the simple question, whether the works produce a sensible injury to the property or impair its comfortable enjoyment.

In *Pinckney v. Ewens*, 3 L. T. (N. S.) 741, the court submitted three questions to the jury: 1. Was the plaintiff's enjoyment of his property sensibly diminished by the nuisance, if any, carried on by the defendant? 2. Is the trade of a fell-monger a proper trade? 3. Was the trade carried on in a proper place?

The jury having found for the plaintiff upon the first question, although they found the trade a proper one, and that it was exercised in a proper place, yet judgment was rendered for the plaintiff, upon the ground that actual damage having resulted neither the trade or place could be regarded as proper.

SEC. 490. As further illustrative of the rules applicable to such classes of wrongs, in determining the legal rights of the parties, and the question as to whether the place where the trade is exercised is a *convenient* or *proper* place, it may be said that the locality, the uses to which it is devoted, the presence of other nuisances, their character and extent, are all to be considered, and the injury complained of must be directly or clearly traceable to the works of the defendant. In the language of Lord CRANWORTH in the house of lords, in *Tipping v. St. Helen Smelting Co.*, *ante*: "I perfectly well remember when I had the honor to be one of the barons of exchequer, trying a case in the county of Durham, where there was an action for smoke in the town of Shields. It was proved incontestably that smoke did come, and in some degree interfered with a certain person, but I said: 'You must

look at it, not with a view to the question whether abstractly that quantity of smoke was a nuisance, *but whether it was a nuisance to a person living in the town of Shields*; because, if it only added in an infinitesimal degree to the quantity of smoke, I thought that the state of the town rendered it altogether impossible to call that a nuisance.' ”

SEC. 491. The mere fact that other nuisances exist in the locality that produce similar results is no defense, if the nuisance complained of adds to the nuisance already existing, to such an extent that the injury complained of is measurably traceable thereto. It is not necessary that all the injury should be the result of the nuisance sought to be charged; if it is of such a character, and produces such results that, standing alone, it would be a nuisance to the plaintiff, the fact that it is the *principal*, though not the sole, agent producing the injury is sufficient, at least as evidence of the plaintiff's right.¹

SEC. 492. Neither the fact that the trade is lawful, or that it is needful, or that the injury is unavoidable in the exercise of the trade, will excuse its exercise in a locality where it inflicts actual injury upon others, and that place for the exercise of a trade, is a *convenient* one only, when it is carried on where no injury results to others from it.² The only question for a jury is, whether injury and damage result from the use of property complained of, and, if the question is submitted to them, whether the trade is a lawful one, and whether it is carried on in a convenient and proper manner, and they find in the affirmative; yet, if they find that *damage* results to others therefrom, their verdict is entered for the plaintiff. The question of the lawfulness of the trade, or the convenience of the place, are not proper questions for the jury; but, while on the one hand it is not error for the court to submit the question to them,³ neither on the other is it error to refuse to do so.⁴

¹ *People v. Mallary*, 4 N. Y. Sup. Ct. Rep. 267; *McKeon v. See*, 51 N. Y. 274; *Mulligan v. Elias*, 12 Abb. Pr. (N. S.) 259. 11 H. L. Cas. 648; *Robinson v. Baugh*, 31 Mich. 291.

³ *Pinckney v. Ewens*, 17 L. T. (N. S.) 741.

⁴ *Stockport Water Works Co. v. Potter*, 7 H. & N. 167.

² *Tipping v. St. Helen Smelting Co.*,

SEC. 493. In *Stockport Water Works Co. v. Potter*, *ante*, which was an action against the defendants, who were calico printers, for injuries resulting to the plaintiff by the pollution of the waters of a stream flowing through the plaintiff's land, by reason of the noxious and poisonous ingredients used by them in their business, and discharged into the stream. Upon the trial at assize, before CHANNELL, B., the judge submitted several questions to the jury, among others the following:

"*Eighth.* Was the discharge of the water from the defendants' works with noxious matter, causing damage to the plaintiffs, necessary and unavoidable, or might the same have been avoided by them by using reasonable care, that is, not by any extravagant outlay, but in the ordinary course of management of their business, with such an outlay as such a business requires?"

To this question the jury answered that they knew of no means by which the injury could be avoided.

"*Ninth.* Has the defendant, by discharging matters into the stream, occasioned injury to the plaintiffs in *excess* of the rights exercised by them for twenty years before the discharge of the matters complained of?"

"*Tenth.* Was the defendant's trade a lawful trade, carried on for purposes necessary or useful to the community, and carried on in a reasonable and proper manner, and in a reasonable and proper place?"

To the last questions the jury returned an affirmative answer, and upon this finding the judge directed a verdict to be entered for the plaintiffs, reserving leave to the defendants to move to enter a verdict for them upon the finding of the jury upon the *tenth* question.

Upon hearing in exchequer, MARTIN, B., said: "I believe we are all of the opinion that there was no evidence to go to the jury upon the tenth question, and, secondly, *if there was, it is immaterial, and can have no effect upon the rights of the parties.* The tenth question was, was the defendant's trade a *lawful* trade? No doubt it was. Was it carried on for purposes necessary and useful to the community? No doubt it was. Was it carried on in a reasonable and proper manner, and in a proper place? On that there is really no evidence whatever. No one saw how the

business was conducted, and it is impossible to say that there was any evidence that it was carried on in a reasonable and proper manner, or that there could be any thing more than a mere surmise on the subject. But suppose there was, how could it affect the people of Stockport? The defendants carried on their trade primarily for their own profit, and the public are benefited by the carrying on of all trades, for they have an interest in persons using their industry and capital. But what answer is that to persons whose water for drinking is affected by arsenic poured into it by persons carrying on one of these trades?" The judgment of the lower court was unanimously sustained.

CHAPTER FIFTEENTH.

NOISOME SMELLS.

- Sec. 494. Noisome stench as a nuisance.
495. Hurtfulness or unwholesomeness not necessary.
496. A smell simply disagreeable creates a nuisance.
497. No such thing as a nuisance *per se* as applied to a trade.
498. Rule in *Catlin v. Valentine*.
499. Fact of nuisance must be proved.
500. Rule as to ordinary uses of property.
501. *Prima facie* nuisances.
502. Nuisances *per se*.
503. Change in the rule.
504. Slaughter-houses *prima facie* nuisances.
505. Should be located away from inhabited districts.
506. Rule in *Brady v. Weeks*.
507. Coming to a nuisance no defense.
508. Leasing premises subjected to nuisance no defense.
509. Rule in *Howell v. McCoy*.
510. Regulation of slaughter-houses.
511. Slaughter-houses nuisances, even when not productive of noxious smells.
512. Privies *prima facie* nuisances.
513. Liability of parties for erections liable to become nuisances.
514. Rule in *Tenant v. Goldwin*.

- SEC. 515. Tallow factories *prima facie* nuisances.
 516. Melting houses — Downie v. Oliphant.
 517. Rule in Peck v. Elder.
 518. Hog-sties as nuisances.
 519. Cattle-yards, when nuisances.
 520. Tanneries *prima facie* nuisances.
 521. Soap boileries *prima facie* nuisances.
 522. Rule in Howard v. Lee.
 523. Ballamy v. Comb and Meigs v. Lester.
 524. Radenhurst v. Coates.
 525. Jamieson v. Hillcote, and Charity v. Riddle.
 526. Livery stables, when nuisances.
 527. Stenches, noise, or collection of flies.
 528. Rule in Dargan v. Waddell.
 529. Private stables may become nuisances from same causes.
 530. Various uses of property regarded as *prima facie* nuisances.
 531. Injury to property or its enjoyment, test of nuisance from noxious trade.
 532. Real injury essential.
 533. Time as an element.
 534. Private actions for injuries sustained from noxious trades which are public nuisances.
 535. Rule in Francis v. Schoellkopf, Ottawa Gas Co. v. Thompson, Wesson v. Washburne Iron Co.
 536. Rule in Soltan v. DeHeld.
 537. Special injuries defined.
 538. Rule in Rex v. Dewsnap.
 539. Robbins' Case.
 540. General rule.
 541. When indictments lie.

SEC. 494. The corruption of the atmosphere by the exercise of any trade, or by any use of property that impregnates it with noisome stenches, has ever been regarded as among the worst class of nuisances, and the books are full of cases in which *any* use of property producing these results has been regarded as noxious and a nuisance, whether arising from the exercise of a trade or business, or from the ordinary or even *necessary* uses of property. As has been before observed, the right to have the air float over one's premises free from all unnatural or artificial impurities, is a right as absolute as the right to the soil itself, but while there are certain uses of property that are necessarily incident to its ordinary use, that necessarily impart more or less of impurity thereto, these uses are recognized as lawful when reason-

ably exercised, and must be submitted to as among the incidents of life in towns or thickly-settled districts, but there is no use of property productive of noxious smells to such an extent as to operate an essential annoyance to others, that can be regarded as coming within the ordinary or necessary uses of property. The courts, at an early day, upheld actions for injuries arising from a corruption of the atmosphere from the exercise of this species of trades.¹

SEC. 495. In the case of noisome smells, as with nuisances arising from smoke or noxious vapors, the stench must be of such a character as to be offensive to the senses, or as to produce actual physical discomfort, such as materially interfere with the comfortable enjoyment of property within their sphere.² It is not necessary that the smells should be hurtful or unwholesome, it is sufficient if they are so offensive, or produce such annoyance, inconvenience or discomfort, as to impair the comfortable enjoyment of property, by persons of ordinary sensibilities.³

SEC. 496. A smell that is *simply disagreeable* to ordinary persons is such a physical annoyance as makes the use of property producing it a nuisance, whether it is hurtful in its effects or not;⁴

¹ Aldred's Case, 9 Coke, 58 a., Pig sty; Pappineau's Case, 2 Stra. 686, Tannery; Morley v. Pragnall, Cro. Car. 510, Tallow Chandler; Toyhaes' Case, cited in Cro. Car. 510, Tallow Chandler; Jones v. Powell, Hutt. 136, tobacco mill; Styman v. Hutchinson, 2 Selwyn, 1047, Privy; Rex v. Niel, 2 C. & P. 485, Varnish making; Rex v. White, 1 Bur. 333, Chemical works; Rankett's Case, 2 Rolle's Abr. 140, 141, melting stinking tallow; Rex v. Cross, 2 C. & P. 483, slaughter-house; Rex v. Watts, 2 C. & P. 486, slaughter-house; Rex v. Ward, 1 Burr. 333, vitriol works.

² Catlin v. Valentine, 9 Paige's Ch. (N.Y.) 576, Slaughter-house; Pottstown Gas Co. v. Murphy, 39 Penn. St. 257, Gas works; Columbus Gas Co. v. Freedland, 12 Ohio St. 392, Gas works; Kirkman v. Handy, 11 Humph. (Tenn.) Livery stable; Com v. Brown, 13 Met. (Mass.) 365; Wolcott v. Mellick, 3 Stockt. (N. J.) 204; Cleveland v. Gas Light Co., N. J.

³ Pickard v. Collins, 23 Barb. (N. Y. S. C.) 444, barn; Story v. Hammond, 4 Ohio St. 376; Peck v. Elder, 3 Sandf. (N. Y. S. C.) 126; Cropsey v. Murphy, 1 Hilt. (N. Y. C. P.) 126; Francis v. Schoellkopf, 53 N. Y. 152; Jamieson v. Hill, 12 F. C. (Sc.) 424; Knight v. Gardner, 19 L. R. (N. S.) 673; Hart v. Taylor, 4 Mur. (Sc.) 313; State v. Wetherall, 5 Harring. (Del.) 487; Brady v. Weeks, 3 Barb. (N. Y. S. C.) 157; Manhattan Gas-light Co. v. Barker, 36 How. Pr. (N. Y.) 258; Fertilizing Co. v. Van Keuren, 36 N. J. 265.

⁴ Walter v. Selfe, 4 Eng. L. & Eq. 20; Smith v. McConathy, 11 Miss. 517; People v. Taylor, 6 Park. Crim. R. (N. Y.) 347; McCredie v. McBrau, 32 Jur. 184; Pickard v. Collins, 23 Barb. (N. Y. S. C.) 444; Broadbent v. Imperial Gas Co., 7 De G. M. & G. 436; Stowe v. Mills, 39 Conn. 426; Pentland v. Henderson, 17 D. (Sc.) 542; 27 Jur. 241; Smith v. Humbert, 2 Kerr (N. B.), 602.

and, as nuisances of this character can produce no *tangible* injury to property, but only affect its value by rendering its enjoyment disagreeable or uncomfortable, the rule of damage is necessarily, in most instances, discretionary with a jury, and is confined to such a sum as in their judgment, in view of the character of the nuisance, the locality, and the discomfort produced, the party is entitled to, for the depreciation in value, and the injury to its enjoyment.¹

SEC. 497. Strictly speaking, there is no such thing as a use of property that is a nuisance *per se* outside of that class of nuisances that affect the morals of society, or public rights, or are dangerous to the lives of mankind. There are a class of trades and uses of property that, by the experience of mankind, have been demonstrated to be productive of ill results generally, so that courts of law and equity, when called upon to abate them, treat them as *prima facie* nuisances; but there are no classes of trades or uses of property that are actionable or indictable at law, *because* they are of a particular class, nor without proof that they actually produce injurious results; for, while human experience has demonstrated that some uses of property are generally productive of ill results, so, too, the same experience has demonstrated the fact that human ingenuity is fertile in expedients by which many hurtful trades, and trades that have formerly been regarded as nuisances *per se*, are rendered entirely innocuous and harmless in any locality. If a particular trade is a nuisance *per se*, no evidence of hurtful results in a private action would be necessary, simple proximity to the property of another would be sufficient, and, in an indictment, a simple allegation that the trade was carried on in a public place, would be all that would be required; but, in fact, there are no trades or use of property, other than such as have been previously stated, that are nuisances *per se*; but there are a large class that are *prima facie* nuisances, so that a court of equity will restrain their operations in a particular locality, while the question of nuisance is being tested.

¹ Francis v. Schoellkopf, 53 N. Y. (N. Y. S. C.) 252; McKeon v. See, 4 152; Illinois Central R. R. Co. v. Grabil, Robt. (N. Y. S. C.) 449; Aldridge v. 50 Ill. 241; Hutchins v. Smith, 63 Barb. Stuyvesant, 1 Hall (N. Y. S. C.), 210.

SEC. 498. In *Catlin v. Valentine*,¹ the plaintiffs were the owners of property in the city of New York, on the east side of Second avenue. The defendant began the erection of a building on the corner of Second avenue and Fifth street, to be used as a slaughter-house. The plaintiffs brought a bill in equity to restrain the erection of the building soon after it was commenced. The defendant having filed an answer, setting forth that while he intended to use the building as a slaughter-house, yet he intended to so conduct the business as not to be a nuisance to any one, the court modified the injunction so as to permit the erection of the building, but restraining its use as a slaughter-house until final hearing upon appeal. WALWORTH, Ch., said: "The situation of the defendant's building, in reference to the dwellings of the complainants, would *prima facie* render the occupation of such building for the purpose of slaughtering cattle there a nuisance. And as there is no real necessity that such an offensive business should be carried on in this part of the city, where many valuable dwelling-houses of the best kind are already erected, and are continuing to be built, the vice-chancellor was right in retaining the injunction until final hearing. The answer of the defendant that a slaughter-house would not be offensive to the plaintiffs, is matter of opinion only, and is not such a denial of the whole equity of the bill as to entitle the defendant to a dissolution of the injunction as a matter of course. To constitute a nuisance, it is not necessary that the noxious trade or business should endanger the health of the neighborhood. It is sufficient if it produces that which is offensive to the senses, and which renders the enjoyment of life uncomfortable.² It is possible to carry on the business of slaughtering cattle, to a limited extent, in such a manner as not to be a nuisance. But it is wholly improbable that any one will subject himself to the necessary expense to enable him to do it in that part of the city, when the business can be carried

¹ *Catlin v. Valentine*, 9 Paige's Ch. (N. Y.) 575; *Peck v. Elder*, 3 Sandf. (N. Y. S. C.) 126; *Swinton et al. v. Pedie*, 15 Shaw & D. 775; *M. & R.* 1018; *The Burnt Island Whale Fishing Co. v. Trotter*, 5 W. & S. 649; *Attorney-General v. Steward*, 20 N. J. 415.

² *Rex v. Niel*, 2 C. & P. '485; *Rex v. White*, 1 Burr. 337; *Walter v. Selfe*, 4 Eng. Law & Eq. 20; *Ross v. Butler*, 20 N. J. 275; *Cleveland v. Gas Co.*, 5 C. E. Green (N. J.), 294; *Wesson v. Washburn Iron Co.*, 18 Allen (Mass.), 95; *Attorney-General v. Steward*, 20 N. J. 415.

on in the unsettled parts of New York, or in parts of the city where property is less valuable, without the great cost and labor which would be requisite to carry it on where the defendant's buildings were being erected when this bill was filed. In this case, *the defendant, upon final hearing*, will have the opportunity to produce proofs to show that the slaughtering of cattle at the place proposed *will not be offensive to the neighboring inhabitants*, and injurious to them in the enjoyment of their property."

Thus, it will be seen that in this case, where the defendant was about to commence the business of slaughtering cattle in a populous locality, and in the very heart of a great city, the learned chancellor only continued the injunction until final hearing, upon the ground that the business was *prima facie* a nuisance. And when it is remembered that in one of the cases to which the chancellor referred (*Swinton v. Pedie*, McL. & Robt. 1018), it was held, that the business of slaughtering cattle in a populous locality is *per se* a nuisance, this position of the court is significant as following the doctrine of the text, and taking cognizance of the fact that nothing can be a nuisance to a private right, unless it is in violation of the rights of others, and produces actual injury and damage, and that while human experience has demonstrated that certain uses of property are generally nuisances, yet that that same experience has also demonstrated, that out of the fertility of the human brain so many improvements are produced, that it is possible to reduce the most offensive and noxious trade to one that is wholly inoffensive and innocuous in any locality.

SEC. 499. At law, the idea of a nuisance *per se*, except in the instances named, and in the case of overhanging another's land, is never recognized. Neither is the idea of a *prima facie* nuisance. The fact that a slaughter-house, works for smelting copper, lead, chemical works, or any other works, however injurious or offensive they may have proved previously, have been erected near another's property, does not establish even a *prima facie* case for the plaintiff. On the contrary, a declaration simply alleging that any such works had been erected near the plaintiff's premises, without setting forth the fact that, from the use of such works, some legal right had been invaded, and actual damage had

been sustained by the plaintiff, would clearly be demurrable. There can be no nuisance, unless thereby another's rights are invaded in some of the ways recognized by the law as producing an actionable injury, and in order to uphold an action at law, or an indictment for a nuisance, the invasion of a legal right must be clearly set forth in the pleadings, and established by proof.¹

SEC. 500. In *Pickard v. Collins*, 23 Barb. (N. Y. S. C.) 444, this doctrine was laid down, following the language of SAVAGE, C. J., in *Mahan v. Brown*: "The person who makes a window in his house, which overlooks the privacy of his neighbor, does an act which, strictly, he has not a right to do, although it is said no action lies for it. He is therefore encroaching, although not strictly and legally trespassing upon the rights of another. He enjoys an easement, therefore, in his neighbor's property, which may ripen into a right. But before sufficient time has elapsed to raise a presumption of a grant he has no right, and can maintain no action for being deprived of that easement, let the *motive* of the deprivation be what it may; and the reason is, that in the eye of the law he is not injured; he is deprived of no right, but only prevented from acquiring a right, without consideration, in his neighbor's property. The defendant has not so used his property as to *injure* another. *No one, legally speaking, is injured or damaged, unless some right is infringed.* The refusal or discontinuance of a favor gives no cause of action."

While the statement of the learned judge as to the acquisition of an easement of light or prospect in another's premises, by long user, is obnoxious to criticism, yet the general doctrine that no one can be said to be legally injured unless some legal right is invaded is a doctrine too well sustained by authority and in principle to be questioned. This being the case, it will be readily seen that no trade or use of property can be said to be a nuisance *per se*, and that no trade or use of property can ever be a nuisance in fact, unless it invades the legal rights of another, and that, to sustain an action at law therefor, the right, its invasion and consequent damage, must always be alleged and proved.

¹ *Chatfield v. Wilson*, 26 Vt. 327; and *v. Collins*, 23 Barb. (N. Y. S. C.) 444; *Harwood v. Benton*, 32 id. 342; *Mahan v. Brown*, 13 Wend. (N. Y.) 124; *Pick-*

SEC. 501. But, as has been before stated, there are certain trades and uses of property that are *prima facie* nuisances, because they have been demonstrated to be productive of ill results generally. But a court of law never recognizes this distinction, but imposes upon every person seeking a recovery for damages resulting from a noxious trade, the burden of proving clearly, that the trade *is* a nuisance in fact, and that he has been injured thereby. This burden is always cast upon the plaintiff, and the fact that a similar use of property has a thousand times been held a nuisance in other cases, makes nothing for him. He must establish the fact of actual nuisance as much as though the trade was new, and its effects generally unknown.¹ But in a court of equity when a party is seeking to restrain the exercise of a trade upon the ground of nuisance, the court recognizes the distinction between a trade or use of property that has been held a nuisance, and whose results are generally ill, and one which has not been so held, or about whose effects little is generally known.² Under such circumstances, a court of equity will grant and uphold an interlocutory injunction to restrain the use of property complained of, even after the filing of an answer in which the fact of nuisance is denied, until the question can be fully tried, when, generally, in the case of all other alleged nuisances, the injunction will be dissolved upon coming in of the answer denying the nuisance.³

SEC. 502. Nuisances that are prejudicial to public morals, as well as those which endanger the lives of mankind, such as the erection of powder magazines or nitro-glycerine works,⁴ or such as are injurious to public rights, as the obstruction of highways or navigable streams,⁵ or the overhanging of another's land,⁶ are all regarded as nuisances *per se*, because no proof is required beyond the actual fact of their existence, to establish the nuisance. No ill effects need be proved. In the case of overhanging, it was held as early as *Baten's Case*, 9 Co. 54, that "if a man

¹ Dawson v. Moore, 7 C. & P. 23.

² Attorney-General v. Steward, 5 C. E. Green (N. J.), 415; Swinton v. Pedie, 15 Shaw & D. (Sc.) 775; Peck v. Elder, 3 Sandf. (N. Y. S. C.) 126.

³ Dubois v. Budlong, 15 Abb. Pr (N. Y.) 154.

⁴ Weir v. Kirk, 73 Penn. St. 84.

⁵ Hale's De Jure Mairs, 12.

⁶ Pendruddock's Case, 5 Coke, 101.

erects a house whereof a part overhangs my house or land, it is a nuisance to my house, for the water must *necessarily* fall upon my house or land, *Cujus est solum, ejus est usque ad celum*, and it takes away my air and prevents me to exalt my house." In such a case, an invasion of the air itself, is a violation of my right, and the law presumes the necessary damage to uphold it.¹ But in all other cases, not only must the *use* of the property be shown, but also the *effect* of the use, and the effect must be such as to clearly establish the violation of the right. Therefore, while there are a large class of *prima facie* nuisances, the class of nuisances *per se* is very limited.

SEC. 503. Formerly many trades were regarded as nuisances *per se*, and their presence in a town or thickly-settled district was regarded as unlawful, the law presuming that by reason of their noxious character, they would be productive of injurious results.

Thus Hawkins in volume 1, page 363 of his Pleas of the Crown, says, "It has been holden that it is no common nuisance to make candles in a town, because the needfulness of them shall dispense with the noisomeness of the smell. But the reasonableness of this opinion seem justly to be questionable, because whatever necessity there may be that candles shall be made it cannot be pretended to be necessary to make them in a town. And surely the trade of a brewer is as necessary as that of a chandler, and yet it seems to be agreed that a brew house erected in such an inconvenient place, wherein the business cannot be carried on without greatly incommoding the neighborhood, is a common nuisance, and so, in the like case, is a glass house or swine yard."

But, while for a long time the courts clung to the idea that all those trades and uses of property which, by experience, had been demonstrated to be of a noxious and hurtful character, were nuisances *per se*, such as a beer house,² a privy,³ a glass house,⁴ a tannery,⁵ a tobacco mill,⁶ a swine sty,⁷ a lime kiln,⁸ a candle factory,⁹

¹ Fay v. Prentice, 1 C. B. 828.

² Jones v. Powell, Palm. 537; Hutt. 36.

³ Stynan v. Hutchinson, 2 Selw. 1047.

⁴ 1 Hawkins' P. C. 363; Queen v. Wilcox, 1 Salk. 458.

⁵ Rex v. Pappineau, 2 Strange, 686.

⁶ Jones v. Powell, Hutt. 136.

⁷ Aldred's Case, 9 Co. 59.

⁸ Id.

⁹ Toyhale's Case, Cro. Car. 510; Rankett's Case, Pasch. 3.

a smith's forge,¹ a smelting house for lead,² a smelting house for copper,³ and numerous other uses of property which we will not stop to enumerate, yet, as the world progressed in civilization, the wonderful improvements wrought by science in all departments of life, has shown that this position cannot now be upheld in reference to any trade. This change in the condition of things as well as the change in the law in this respect is well expressed by the learned Lord Chancellor, in *Arnot v. Brown*, 1 Macq. 229, which was a case that came before the Scotch courts, in which an interdict was sought, to stop the manufacture of candles in a town. "A candle manufactory," says the judge, "is not necessarily a nuisance. Science has gone far to prevent many things from being a nuisance, that were formerly of that description. It is not, therefore, very easy to determine before hand, whether or not any given thing shall prove a nuisance."

When it is remembered that this announcement of a change in the course to be pursued by courts in dealing with this class of wrongs, proceeded from a court which, but a short time before, in the case of *Swinton v. Pedie*, 15 Shaw & Dunlap, 575, had held that a slaughter-house in a town was a nuisance *per se*, and had refused to allow the experiment to be tried to determine whether the manner in which the defendant proposed to carry on the business, was *in fact* a nuisance, it is suggestive of the fact, that the almost unlimited range of human ingenuity is equal to the task of sweeping out of existence the entire class of nuisances *per se*, and rendering any trade innocuous, in almost any locality, and that courts, keeping pace with the march of human progress, take judicial notice of the wonderful improvements wrought by science; and now only regard those trades formerly regarded as noxious *per se*, as *prima facie* nuisances.⁴

SLAUGHTER-HOUSES

SEC. 504. Slaughter-houses are regarded as *prima facie* nuisances, and their existence, so near to dwellings as to impair their

¹ *Bradley v. Gill*, Lutw. 69.

² *Poynton v. Gill*, 2 Rolle's Abr. 140.

³ *David v. Grenfell*, 6 C. & P. 607.

⁴ *Brady v. Weeks*, 3 Barb. (N. Y. S. C.) 452.
156; *Peck v. Elder*, 3 Sandf. (N. Y. S.

C.) 126; *Howard v. Lee*, id. 281; *Cropsey v. Murphy*, 1 Hilt. (N. Y. C. P.) 126; *Dubois v. Budlong*, 15 Abb. Pr. (N. Y.)

comfortable enjoyment, is an actionable injury,¹ and their presence in a public place, or near a highway, whereby the public is annoyed, although only for a temporary period, is a public nuisance.² The smells arising therefrom need not be hurtful to life or prejudicial to health,³ but they must be of such a character as to cause actual physical annoyance to persons of ordinary sensibilities, and that to such an extent as to produce actual physical discomfort.⁴ If the nuisance is of a *hurtful* character, if it is injurious to health or life, much less evidence is required to make it a public nuisance, than where its effects are merely annoying, and, in private actions, the damages recoverable in such cases are much larger; and this is true, not only as to slaughter-houses, but of all classes of nuisances.⁵

SEC. 505. Slaughter-houses being generally of a noxious character, should not be established in public places, but rather in the outskirts of towns, away from habitations and public roads, and their establishment elsewhere is always perilous to the owner, for, if they cannot be so conducted as not to become of a noisome character, either to individuals or the public, they will be stopped by a court of equity, or by action or indictment in a court of law.⁶ Even when they are originally built in a place remote from the habitations of men, or from public places, if they become actual nuisances by reason of roads being afterward laid out in their vicinity,⁷ or by dwellings subsequently erected within the sphere of their effects, the fact of their existence prior to the laying out of the roads, or the erection of the dwellings, is no defense.⁸

SEC. 506. In *Brady v. Weeks*,⁹ the question as to the rights of parties coming to a nuisance was raised, and ably discussed and

¹ *Swinton v. Pedie*, 1 Macq. 74; *Catlin v. Valentine*, 9 Paige's Ch. (N.Y.) 574.

² *Rex v. Cross*, 2 C. & P. 483; *Rex v. Watts*, id. 486.

³ *Brady v. Weeks*, 3 Barb. (N.Y. S.C.) 156.

⁴ *Attorney-General v. Steward*, 5 C. E. Green (N. J.) 415; *Walter v. Selfe*, 4 Eng. Law & Eq. 20.

⁵ *Rex v. Dixon*, 10 Mod. 339; *Regina*

v. Leach, 6 id. 143; *Viner's Abr.*, Nuisance, 46; *Hawkins' P. C.* 198.

⁶ *Brady v. Weeks*, 3 Barb. (N.Y. S.C.) 156; *Rex v. Niel*, 2 C. & P. 485.

⁷ *Rex v. Cross*, 2 C. & P. 483, 486.

⁸ *Brady v. Weeks*, ante; *St. Helen Smelting Co. v. Tipping*, L. R. Eq. Ca. 66; *Bankhardt v. Houghton*, 27 Beav. 425.

⁹ *Brady v. Weeks*, 3 Barb. (N.Y. S.C.) 156.

disposed of by the court. In that case, the plaintiff, with others, brought a bill in equity to restrain the defendant from carrying on the business of slaughtering cattle in a building on the north side of Twelfth street, between Fifth and Sixth avenues, in the city of New York. The defendant had occupied this building for that purpose for about fourteen years, and when the building was erected there were but few buildings in the vicinity. The dwellings of the plaintiffs had been erected within three or four years from the time when the bill was brought, and the defendant insisted that the plaintiffs, having come to the nuisance, were estopped from complaining of its effects. PAIGE, J., in disposing of this branch of the case, said: "When the slaughter-house was erected, it was remote from the thickly-settled part of the city; but it seems that the city has now grown up to it, and that the necessities of the population require the occupation of the lots in its immediate vicinity for dwellings. When it was erected it incommoded no one, but now it interferes with the enjoyment of life and property, and tends to deprive the plaintiffs of the use and benefit of their dwellings. There can be no real necessity for conducting such an offensive business as slaughtering cattle in this part of the city, which is now occupied by valuable and costly dwellings. As the city extends, such nuisances should be removed to the vacant ground beyond the immediate neighborhood of the residences of the citizens. This, public policy, as well as the health and comfort of the population of the city, demands, and it seems that, whenever *any* offensive trade becomes an injurious nuisance to any person, such person has a remedy by an action on the case for damages, or by writ of nuisance, to have the nuisance abated, upon the principle that every continuance thereof is a new or fresh nuisance."¹

SEC. 507. In *Tipping v. St. Helen Smelting Co.*, 1 L. R. Eq. Cas. 66, this question was directly raised in the English courts under circumstances extremely favorable to the defendants, if any such defense could be of avail; but the court held, that the fact

¹ *Westbourn v. Mordaunt*, Cro. Eliz. Com. 220; *Blunt v. Aiken*, 15 Wend. 191; *Pendruddock's Case*, 5 Coke, 101; (N. Y.) 526; *Benwick v. Crunden*, Cro. Staple v. Spring, 10 Mass. 74; *Alexander v. Kerr*, 2 Rawle, 83; 2 Black. Eliz. 403.

that the plaintiff *had come to the nuisance*, did not, in any measure, abridge his rights, or deprive him of all proper redress for the injuries occasioned to him by the nuisance.

In that case, it appeared that in August, 1859, a part of the estate of Sir Henry de Houghton, near St. Helen's, was put up for sale in lots. A Mr. Critchley bought one of the lots, being the lot on which the defendants afterward erected their works. He bought it for the purpose of erecting copper works, and went into immediate possession, and had the works nearly completed before the 14th of March, 1860. In July, 1860, other parts of Sir Henry de Houghton's estate were put up for sale, including Bokld Hall and the park belonging to it, and were purchased by the plaintiff. The plaintiff admitted that, when he purchased the property, he knew of the existence of the defendant's copper works. It was also admitted that there were numerous chemical works in the neighborhood emitting deleterious vapors, but it did not appear that these had ever produced any appreciable injury to the plaintiff's estate.

In 1861, a company was projected for carrying on the copper works. The vapors from the works had already produced a sensible injury to the plaintiff's trees, and apprehending that the company would increase the capacity of the works, he communicated with them in reference to the injuries being inflicted upon his property by the works. No understanding was arrived at, and, in 1862, the company was formed, and, as the works were continued, the plaintiff brought his action at law, and recovered a verdict of £360. The defendants continuing their works after the verdict at law, the plaintiff brought a bill in equity to restrain them. The defendants insisted that the plaintiff having knowledge of the existence of their works before he bought his property, and having come to the nuisance, was estopped in equity from abating the same.

But Vice-Chancellor PAGE WOOD held that the fact that the plaintiff had come to the nuisance, did not disentitle him to equitable relief. He said that the fact that the parties had purchased from the same vendor, and that the defendant had purchased for the purpose of erecting copper works, and had actually erected them before the plaintiff purchased his lot,

did not present the same question that would be presented, if the vendor had erected the copper works, and then sold them to the defendant, and that the fact that the vendor knew when he sold the premises that the defendant intended to erect copper works, did not debar him, nor those claiming under him, from complaining of any nuisance that might arise therefrom to other parts of his property. It appearing that the existence of the nuisance was spoken of during the negotiations and resulted in an abatement of the price, the vice-chancellor held that the existence of a nuisance, though liable to be suppressed by legal proceedings, was a fair ground for an abatement of price, yet it could not be inferred from this fact, that in consequence of such abatement in price, the plaintiff had agreed to relinquish his right to complain of the nuisance. The doctrine laid down by the vice-chancellor was sustained upon appeal.¹

SEC. 508. The fact that the person complaining of the nuisance is a tenant from year to year, and that he has continued to lease the premises after the erection of the nuisance, at the same yearly rent, does not operate as a defense, or to prevent the plaintiff from recovering such damages as he has sustained by reason of the nuisance.²

In *Smith v. Phillips*, 8 Phila. Rep. 10, the plaintiff was a tenant from year to year of a truck and fruit farm of forty-nine acres, for which he paid \$800 annual rent. The plaintiff had been in the possession of the farm, at the same annual rent, for thirty-three years. The defendant erected chemical works near the premises, and the smoke and vapors proceeding therefrom injuriously affected his crops, including fruits, vegetables and grains, and the action was brought to recover the damages. The defendant insisted that there could be no recovery by the plaintiff because by renewing the lease after the erection of the nuisance,

¹ *Bankhardt v. Houghton*, 27 Beav. 425; *Smith v. Phillips*, 8 Phila. (Penn.) 10; *Howell v. McCoy*, 3 Rawle (Penn.) 256; *Alexander v. Kerr*, id. 83; *Vedder v. Vedder*, 1 Denio (N. Y.), 252; *Roberts v. Clark*, 17 L. T. (N. S.) 384; *Crosby v. Bessey*, 49 Me. 539; *Bliss v. Hall*, 5 Scott, 500; *Elliot v. Feetham*, 2 id. 197; *Ralf v. Ralf*, 5 Coke, 101. But see *State v. Ellis*, 7 Black. (Md.)

where a contrary doctrine is held and the defendant was permitted to show that the plaintiff came to the nuisance in defense. But while this decision is a decision of a respectable court, yet it is entitled to no weight as against the uniform current of authorities both in this country and England, holding a contrary doctrine.

² *Smith v. Phillips*, ante.

he had voluntarily placed himself in a position to receive the injuries flowing therefrom, and that the fact that he paid the same rent with the nuisance there as before it existed, was a virtual admission on his part that no serious injury resulted from the works. But the court held that no such presumption was to be raised from the facts, and that the plaintiff was entitled to recover the full amount of damage sustained by him the same as though he was the owner of the fee, or tenant for a term of years.

The doctrine of this case is important, and it certainly is predicated upon sound public policy and good common sense. The idea that a wrong-doer can set up, by way of defense, in an action for damages for injuries resulting from his wrongful act, the fact that the plaintiff has not seen fit to be driven away from the premises, or to demand a reduction in the rent, is, to say the least, somewhat audacious, if not preposterous. The principle involved in the case is similar to that in *Tipping v. St. Helen Smelting Co.*, 1 L. R. (Eq. Cas.) 66.

SEC. 509. *Howell v. McCoy*, 3 Rawle (Penn.), 256, is a very strong case in support of the doctrine that coming to a nuisance is, under no circumstances, a defense, either at law or in equity. In that case, the plaintiff and defendant were both lessees of several parcels of the same estate, under the same landlord. The defendant's lease was several years older than the plaintiff's, and he had been in possession of the premises leased by him, and carried on the business of a tanner upon the same stream, during the entire term since the date of his lease, and had during that period discharged, and was when the plaintiff rented the premises below him on the stream, discharging the tan-bark from his works into the stream.

The plaintiff erected a brewery upon the premises below the defendant's works, leased by him, and the defendant continuing to discharge the tan-bark into the stream, he brought his action against the defendant to recover for the injury. The defendant claimed that he had a right to discharge the bark into the stream, and that, as the plaintiff knew that he was doing this when he leased the premises, and as they both derived their title from the same landlord, the plaintiff could not set up a claim for damages

resulting from the nuisance. But the court held that the plaintiff was entitled to recover, and that nothing short of an express grant, or a prescriptive right by twenty years' user to maintain the nuisance, would defeat a recovery.¹ In all actions of this character, the equities are against the wrong-doer and with the person injured,² and, if the wrong-doer escapes the penalty of his wrongful acts, it must be by virtue of some superior legal or equitable right, clearly established.³

SEC. 510. In many of the States, and in most of the large cities and towns, the erection and maintenance of slaughter-houses is regulated by statute or municipal ordinances, but so far as injuries to private rights are concerned, parties are usually left to their common-law remedies. For instances in, and circumstances under, which slaughter-houses have been held nuisance, see the cases cited below.⁴

SEC. 511. The business of slaughtering cattle has been held to be a nuisance where no noxious smells were liberated therefrom, when carried on near a highway, so that the smell of the blood frightened horses passing it, or when the skins taken from the animals are hung upon fences or elsewhere within easy sight of the highway so as to produce the same result.⁵ Also when the business was carried on upon the banks of a stream, and the blood from the animals was discharged into the stream so as to pollute the waters thereof.⁶ Nor will the fact that the waters of the

¹ Crunden's Case, Cro. Eliz. 402; Pendraddock's Case, 5 Coke, 101; Alexander v. Kerr, 2 Rawle (Penn.), 83; Blunt v. Aiken, 15 Wend. (N. Y.) 529; Vedder v. Vedder, 1 Denio (N. Y.), 252.

² Helley v. Helley, 5 Barr. (Penn.) 97.

³ Fay v. Whitmore, 100 Mass. 547.

⁴ Allen v. State, 34 Texas, 230; Catlin v. Valentine, 9 Paige's Ch. 574; Brady v. Weeks, 3 Barb. (N. Y. S. C.) 126; Dubois v. Budlong, 15 Abb. Pr. (N. Y.) 452; Peck v. Elder, 3 Sandf. 126; Swinton v. Pedie, M. L. & Rob. 1018; Cropsey v. Murphy, 1 Hilt. (N. Y. C. P.) 126; Taylor v. The People, 6 Park. Cr. (N. Y.) 347; Munson v. The People, 5 id. 16; Attorney-General v. Steward, 5 C. E. Green (N. J.), 415; Kelt v. Lindsay, 17

F. C. (Sc.) 677; Pentland v. Henderson, 27 Jur. 241; Com. v. Upton, 6 Gray (Mass.), 476; Fay v. Whitman, 100 Mass. 597; Schuster v. Met. Board of Health, 49 Barb. (N. Y. S. C.) 450; State v. Wilson, 43 N. H. 415; State v. Shelbyville, 4 Sneed (Tenn.), 176; Smith v. McConathy, 9 Miss. 517; Bishop v. Banks, 33 Conn. 121; Liverpool New Cattle Market Co. v. Hudson, L. R., 2 Q. B. 131; Anthony v. Breton Market Co., L. R., 2 Exch. 167; Rex v. Cross, 2 C. & P. 483; Rex v. Watts, id. 486; Scott v. Cox, 15 F. C. (Sc.) 535; State v. Koster, 35 Iowa, 221.

⁵ Scott v. Cox, 15 F. C. (Sc.) 535.

⁶ Attorney-General v. Steward, 5 C. E. Green (N. J.), 415; State v. McConathy, 9 Miss. 517.

stream are already partially polluted, justify, or in any measure serve as a defense to an action for an increase of the nuisance, by the discharge of the blood and offal from a slaughter-house into the stream, or by any other method. The discharge of the blood of one hundred hogs into a stream, necessarily creates a nuisance.¹

PRIVIES.

SEC. 512. Privies are regarded as *prima facie* nuisances, and although necessary and indispensable in connection with the use of property for the ordinary purposes of habitation, yet, if they are built or allowed to remain in such a condition as to annoy others in the proper enjoyment of *their* property, by reason either of the noisome smells that arise therefrom,² or by the escape of filthy matter therefrom upon the premises of another,³ or so as to corrupt the water of a well or spring,⁴ they are nuisances, in fact, and render the person erecting or using them liable for all the injurious consequences flowing therefrom.⁵ In *Jones v. Powell*, Hutt. 135, "a brew house and privy in the said house, and burning sea coal in the said brew house, so that by the smoke, stench and unwholesome vapors coming from the said coal and privy, the plaintiff and his family cannot dwell in his house without danger of their health, was adjudged a nuisance, by all the judges, on consideration, for the plaintiff."

SEC. 513. In *Rex v. Pedley*, 1 Ad. & El. 822, the defendant was the owner of twelve dwelling-houses in Bedford, situated upon a public street, which were rented by him to tenants, for which he was paid specific sums by each occupant connected with these houses, and for the use of the tenants, were two privies with an open sink for the reception of ordure, which became nuisances by reason of the intolerable stench that arose therefrom, and the court held that the landlord having erected the

¹ *Holsman v. Boiling Spring Co.*, 1 McCarter (N. J.), 335; *Attorney-General v. Steward*, 5 C. E. Green (N. J.), 415.

² *Jones v. Powell*, Hutt. 135.

³ *Tenant v. Goldwin*, 2 Ld. Raym. 1089.

⁴ *Norton v. Schofield*, 9 M. & W. 665;

Wormersley v. Church, 17 L. R. (N. S.) 190; *Wahle v. Rimbach*, 76 Ill. 323; *Gordon v. Vestry of St. James*, 13 id. 511.

⁵ *Marshall v. Cohen*, 44 Ga. 489; *Cook v. Montagu*, 26 L. T. (N. S.) 471; *Dra-per v. Speering*, 3 id. 365.

privies and dug the trenches, was liable to indictment for the nuisance arising therefrom, on the ground that he who erects a building which is liable to become a nuisance, except great care is exercised, is liable for the consequences if the building becomes a nuisance, and that this would be so even if the tenants had covenanted to repair.¹

SEC. 514. In *Tenant v. Goldwin*, 6 Mod. 311, the defendant had built a privy over a vault adjoining the lands of the plaintiff. The plaintiff dug a cellar on his premises near the vault, and erected a house thereon. The filth from the plaintiff's vault by reason of defects in the vault, escaped into the plaintiff's cellar. The plaintiff brought an action for the injuries sustained by him, alleging that it was the duty of the defendant to maintain the wall of his vault so as to prevent the escape of filth therefrom. Lord Holt, in the early part of the trial, intimated an opinion against the plaintiff's right of recovery, but at the close of the trial he rendered judgment for the plaintiff, saying: "If the defendant has a house of office (a privy) inclosed with a wall which is his, he is of common right bound to use it so as not to annoy another. The reason here is, that one must so use his own as not to hurt another, and as of common right one is bound to keep his cattle from trespassing on his neighbor, so he is bound to use *any thing* that is his, so as not to hurt another by such user."

In the report of this case in 2 Ld. Raymond, 1039, the reporter says that Lord Holt said, "It is enough to say that the plaintiff had a house, and the defendant had a wall, and he ought to repair the wall; but if the defendant has a house of office (privy), and the wall which separates the house of office from the plaintiff's house is all the defendant's, he is of common right bound to repair it. * * * The reason of this case is upon this account, that every one must so use his own as not to do damage to another; and as every man is bound to look to his cattle so as to keep them out of his neighbor's grounds, that so he may receive no damage, so he must keep in the filth of his house of office, that

¹ *Marshall v. Cohen*, ante; *Smith v. Reed*, 2 Park. Crim. Rep. (N. Y.) 160, *Humbert*, 2 Kerr (N. B.) 602; *Cook v. Treadwell v. Davis*, 39 Ga. 84. *Montagu*, 26 L. T. (N. S.) 471; *People*

it may not flow in upon and damnify his neighbor. * * * So if a man has two pieces of pasture which lie open to one another, and sells one piece, the vendee must keep in his cattle so as they shall not trespass upon the lands of his vendor. So a man shall not lay his dung so high as to damage his neighbor, and the reason of these cases is, because every man must so use his own as not to do damage to another.”

The principle announced by Lord Holt in this case has never been seriously questioned, and it will thus be seen that where one erects any thing which, except for the exercise of great care, may become a nuisance, from any one of several causes, the person making the erection is bound, at his peril, to see to it that it does not become so, and is answerable for all the consequences if it does. It would seem, also, that he is liable even though the nuisance occurs from inevitable accident.¹ This liability, also exists, although the nuisance results from inevitable accident, and from the prosecution of a lawful trade. For in the case of a nuisance the question of care is of no account. It is purely a question of results,² and the fact that an injury *does* result, is all that it is necessary to establish. In the case of *Fletcher v. Rylands*, BLACKBURN, J., in referring to this question, refers to a case tried by him against some occupiers of alkali works at Liverpool, and says: “The defendants proved that they, at great expense, erected contrivances by which the fumes of chlorine were condensed and sold as muriatic acid, and they called a great body of scientific evidence to prove that this apparatus was so perfect that no fumes could possibly escape from the defendants’ chimneys. On this evidence it was pressed upon the jury that this damage must have resulted from some of the numerous other chimneys in the neighborhood. The jury, however, being satisfied that the injury was produced by chlorine, drew the conclusion that it had escaped from the defendant’s works somehow, and found for the plaintiff. No attempt was made to disturb the verdict, on the grounds that the defendants had taken every precaution which prudence or skill could suggest to keep those fumes in, and that they could not be responsible unless negligence were shown.

¹ *Fletcher v. Ryland*, 1 L. R. Exch. 289.

² *Fletcher v. Ryland*, 1 L. R. Exch. 289; *Cabill v. Eastman*, 18 Minn. 324 10 Am. Rep. 184.

Yet if the law be as laid down by the majority of the court of exchequer, it would have been a very obvious defense. *If it had been raised, the answer would probably have been that the uniform course of pleading in actions on such nuisances, is to say that the defendant caused the noisome vapors to arise on his premises, and suffered them to come on the plaintiff's without stating that there was any want of care or skill in the defendant, and that their liability was founded on the general rule of law, that he whose stuff it is, must keep it in, that it may not trespass.*¹ There is no difference in this respect between chlorine and water; both will, if they escape, do damage, the one by scorching, and the other by drowning, and he who brings them there, *must, at his peril, see that they do not escape and do that mischief.*²

¹ Tenant v. Goldwin, 1 Salk. 21, 360; 2 Ld. Raym. 1089; 6 Mod. 311.

² Cahill v. Eastman, 18 Minn. 324; 10 Am. Rep. 184; Sutton v. Clark, 6 Taunt. 44, opinion of GIBBS, C. J.; Hay v. Cohoes Co., 2 N. Y. 159; Tremain v. Cohoes Co., id. 161; Smith v. Fletcher, Exchq., June, 1872; McKeon v. See, 51 N. Y. 511; Bagnall v. London & N. W. Railway, 7 H. & N. 423; Williams v. Graucott, 4 B. & S. 195. In Fletcher v. Rylands, on appeal in the house of lords, 3 L. R. (H. L. Cas.) 330, CRANWORTH, J., said: "In considering whether a defendant is liable for damages, which the plaintiff may have sustained, the question in general is not whether the defendant has acted with due care, *but whether his acts have occasioned the damage,*" and he refers to the case of Lambert v. Bessey, Ld. Raym. 432, and says: "This doctrine is founded in good sense. For when one, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer. He is bound *sic utere tuo ut alienum non laedas*. This is the principle of law applicable to cases like the present, and I do not discover in the authorities that were cited any thing conflicting with it." In Smith v. Fletcher, BRAMWELL, B., in discussing the question of care or want of care, in an action for a nuisance, says: "It is said that the defendant did not bring the water there, as in Fletcher v. Rylands. Nor did they in one sense; but in another they did. They so dealt with the soil, that if a flood came, the water,

instead of spreading itself over the surface and getting away innocuously to the proper water-courses, collected and stopped in the hollow which they had made, with no outlet but the fissures or cracks. Suppose the rain, without a flood falling in this hollow, had made, as it will, pools in the lower part, and the water so collected had gone through the fissures and cracks into the mine, instead of being left on the surface, to evaporate and percolate naturally, and that the damage to the plaintiff had been sensible, could the defendants say that they were not liable because they did not cause the rain to fall? Nor can they say they did not cause this flood water to collect where it did, with no outlet but to the mines, because it came there by the attraction of gravitation? It is said that the flood was extraordinary and that they could not foresee it. I repeat, that this may take away the moral blame from them, but how does it affect their legal responsibility? *If for their own purposes, they had diverted this flood into the hollow where it came, though not knowing what would happen, yet it is clear they would be liable: why are they not, if it comes, because it must come, from natural causes?*" This case is a strong authority upon the doctrine announced in the text, because it was admitted upon the trial that there was no negligence on the part of the defendants, and evidence that they had made due provision for ordinary rain falls, was rejected as immaterial.

TALLOW FACTORIES AND MELTING-HOUSES

SEC. 515. Tallow factories and melting-houses are regarded as *prima facie* nuisances, when located in public places or near human habitations. In *Morley v. Pragnall*, Cro. Car. 510, the plaintiff was the owner of an inn in Eaglestock, and the defendant erected a chandler's shop near the inn and carried on there the business of making candles. The fumes and stench arising from the works, in the process of melting the tallow, entered into the plaintiff's inn, and created such an annoyance that his guests left the inn. The defendant insisted upon the authority of *Ran-kett's Case*, Pasch. 3 Jac. B. R., that, his business being a needful one, no recovery could be had. But the court said: "Every man is bound to use his own property so as not to injure another, and when he does that which makes a man's inn unhealthful, and drives away his guests, he shall be answerable."

It is observable, in this case, that the court seemed to regard it as essential to a recovery, that the smell proceeding from works in order to be a nuisance, must be unhealthful, and such, formerly, was regarded as the law; but in *Rex v. White*, 1 Burr. 333, Lord MANSFIELD laid down the broad rule, that *hurtfulness* is not the gist of an action for a nuisance arising from a corruption of the air, but that it is sufficient, if they render the enjoyment of life uncomfortable, and such is now the settled law of all the courts, both in this country and England, as well in actions for damages, as indictments for the public offense.¹

¹ *Rex v. White*, 1 Bur. 333; *Walter v. Selfe*, 4 Eng. Law & Eq. 20; *Roberts v. Clarke*, 17 L. T. (N. S.) 384; *Luscombe v. Steere*, 17 id. 256; *Catlin v. Valentine*, 9 Paige's Ch. (N. Y.) 575; *Brady v. Weeks*, 3 Barb. (N. Y. S. C.) 156; *Peck v. Elder*, 3 Sandf. (N. Y. S. C.) 126; *Ross v. Butler*, 4 C. E. Green (N. J.), 294; *Wolcott v. Mellick*, 3 Stockt. (N. J.) 204; *Cleveland v. Citizens' Gas-Light Co.*, 5 C. E. Green (N. J.), 201; *Attorney-General v. Steward*, id. 415; *Duncan v. Hayes*, 22 N. J. 26; *Rhodes v. Dunbar*, 58 Penn. St. 273; *Sparhawk v. Union Passenger R. R. Co.*, 54 id. 154; *Fusileer v. Spaulding*, 2 La. An. 273; *Bishop v. Banks*, 33 Conn. 118; *Whitney v. Bartholomew*, 21 id. 213; *Gullick v. Tremlett*, 20

Weekly Rep. 358; *Hart v. Taylor*, 4 Mur. 313; *Hackney v. State*, 8 Ind.; *Smith v. McConathy*, 11 Miss. 517; *People v. Taylor*, 6 Park. Cr. (N. Y.) 347; *Prescott's Case*, 2 City Hall Recorder (N. Y.), 161; *Kirkman v. Hardy*, 11 Humph. (Tenn.); *Thiebault v. Conover*, 11 Fla. 143; *Galbraith v. Oliver*, 3 Pittsburgh Rep. 79; *Hutchins v. Smith*, 63 Barb. (N. Y. S. C.) 252; *Cartwright v. Gray*, 12 Grant's Ch. (Ont.) 400; *Barlow v. Kinnear*, 2 Kerr (N. B.), 94; *Wesson v. Washburn Iron Works*, 13 Allen (Mass.), 95; *Donald v. Humphrey*, 14 F. C. (Sc.) 1206; *Ottawa Gas Co. v. Thompson*, 39 Ill. 598; *Watson v. Gas-Light Co.*, 2 U. C. 262; *Smith v. Humbert*, 2 Kerr (N. B.), 602; *Ellis v. State*, 7 Black. (Ind.) 534; *Com.*

SEC. 516. Formerly all establishments for the melting of fat, were regarded as nuisances *per se*, and in actions for their abatement, no ill effects need be shown, as it was presumed if they were located in public places, or near the habitations of men, that ill results would ensue. Thus in *Downie v. Oliphant*, 17 F. C. (Sc.) 491, the defendant was interdicted from erecting an establishment for boiling whale blubber at the end of the town, which was already given up to such nuisances as tanneries, dung-hills, distilleries, etc., upon the ground that the effluvia arising therefrom would increase the nuisance, to the damage of the inhabitants. But latterly, it is the practice in the Scotch courts, to cause an examination to be made to ascertain whether or not the business can be carried on without creating a nuisance, and in this country and England, in actions at law, the ill effects must always be shown, and in proceedings in equity to restrain the erection of works that may become nuisances, such facts must be stated in the complaint as clearly show that a nuisance will be created by the works.¹

SEC. 517. In *Peck v. Elder*, 3 Sandf. (N. Y. S. C.) 126, a bill in equity was brought to restrain the defendants from erecting and putting in operation a large fat-melting establishment at the corner of First street and Fourth avenue, New York. The plaintiffs were the owners of tenements in the vicinity, and alleged that their premises would be injuriously affected thereby. The plaintiff Peck owned five houses on Second avenue, within six hundred feet of the works. J. C. Merritt owned three houses and lots in Fourth street, adjoining the works. R. W. Martin owned a valuable three-story building opposite Merritt's. A. G. Phelps owned twelve dwelling-houses on Second avenue, six on

v. Reed, 34 Penn. St. 275; *State v. Wilson*, 43 N. H. 415; *State v. Shelbyville*, 4 Sneed (Tenn.), 176; *Richard's Case*, 6 City Hall Recorder (N. Y.), 61; *Prout's Case*, 4 id. 87; *Columbus Gas Co. v. Freeland*, 12 Ohio St. 392; *Dargan v. Waddell*, 9 Ired. (N. C.) 244; *Ashbrook v. Com.*, 4 Bush. (Ky.); *Coker v. Birge*, 10 Ga. 336; *Rex v. Niel*, 2 C. & P. 485; *Rex v. Cross*, id. 484; *Davidson v. Isham*, 1 Stockt. (N.

J.) 186; *Babcock v. N. J. Stock Yard Co.*, 20 N. J. 296.

¹ *Ross v. Butler*, 4 C. E. Green (N. J.), 294; *Wolcott v. Mellick*, 3 Stockton (N. J.), 204; *Rhodes v. Dunbar*, 58 Penn. St. 273; *Tipping v. St. Helen Smelting Co.*, 118 E. C. L. 608; *Salvin v. North Brancepeth Coal Co.*, 31 L. T. (N. S.) 154; *Dubois v. Budlong*, 15 Abb. Pr. (N. Y.); *Davidson v. Isham*, 1 Stockt. (N. J.) 186; *Thiebault v. Conover*, 11 Fla. 143.

Fourth street and eight on Fifth street, besides several vacant lots, and all within from six to eight hundred feet of the melting-house, and R. A. Reading owned and occupied a dwelling-house on First avenue within six hundred feet of the works. All the last-named persons were joined with Peck as plaintiffs in the bill.

The plaintiffs alleged that Elder was the president and the other defendants were, with him, trustees of the Butchers' Melting Association, organized for the purpose of conducting, on a large scale, the melting of the fat and tallow from animals slaughtered by the butchers of the city generally; that a melting-house in a city is an intolerable nuisance, eminently offensive to the neighboring population; that it is accompanied by noisome, noxious and offensive stench and smells. The stench from the smoke and vapors being a source of serious annoyance and discomfort for a distance of more than half a mile from the trying vats or kettles. A temporary injunction was granted, but the defendants having filed their answer denying that a melting-house or establishment for the melting and trying of tallow and the fat of animals in a city is a nuisance, and alleging that they intended to so conduct the business that it would not prove offensive or annoying to the neighborhood, and that the locality was, in a great degree, unimproved, and that a large number of slaughter-houses are, and for a long time have been, in operation there, besides various other establishments claimed to be offensive, the injunction was dissolved upon this answer denying the nuisance, and the plaintiffs appealed to the Chancellor. During the pendency of the appeal and before the hearing thereon, the defendants completed their building and commenced operations. The defendants were thereupon indicted for the nuisance, and convicted and fined. When the case was heard before Chancellor WALWORTH upon appeal, the injunction was restored, the Chancellor saying: "It is of no consequence whether the plaintiffs reside on their property or not. It is sufficient that the nuisance is calculated directly to diminish its value, by preventing its being occupied by the plaintiffs, or by good tenants, who are willing and able to pay the rents, *or to destroy the value of the property as building lots.* The answer denies that the melting-

house is a nuisance; but it *does* not, as it *could* not, deny the fact that the melting of animal fat in such a place, and in such quantities, must be offensive to the senses of the masses of the community, though persons, by long use, may become so accustomed to an offensive smell, as to prevent its making them actually sick." For cases in which tallow-factories and melting-houses have been held nuisances, see the cases cited below.¹

HOG-STYES AND CATTLE-YARDS.

SEC. 518. The keeping of hogs in pens, in a city or town, or near highways or dwellings, in such a location and condition as to annoy the public, or impair the comfortable enjoyment of property, by reason of the noxious smells emitted therefrom, is regarded as a nuisance, even though it is one of the ordinary uses of property. Indeed, the keeping of hogs in pens in such situation is regarded as *prima facie* a nuisance, and both as an actionable and indictable offense.² But it is evident, from the cases, that the nuisance arises from the neglect of the owner to keep the pens in a clean condition; and when the pens are kept clean, so as to prevent the liberation of noisome smells, they are not nuisances, unless they become so from the fact that the hogs are too noisy; any more than a cow-yard or any other ordinary use of property.

In *Wanstead Local Board v. Hill*, 13 C. B. (N. S.) 479, in a case arising under a statute authorizing boroughs to make regulations for the suppression and prohibition of nuisances, it was held that the power only extended to such acts as *must necessarily* become nuisances, and that a by-law imposing a fine upon every

¹ *Allen v. State*, 34 Tex. 230; *Dubois v. Budlong*, 15 Abb. Pr. (N. Y.) 126; *Toyhale's Case*, Cro. Car. 510; *Radenhurst v. Coate*, 6 Grant's Ch. (Ont.) 140; *Arnot v. Brown*, 1 Stuart (Sc.), 694; 2 Rolle's Abr. 140, 141; *Cropsey v. Murphy*, 1 Hilt. (N. Y. C. P.) 126; *Downie v. Oliphant*, 17 F. C. (Sc.) 491; *Peck v. Elder*, 3 Sandf. (N. Y. S. C.) 126; *Morley v. Pragnall*, Cro. Car. 510; 1 Hawk. P. C. 323; *Trotter v. Farnie*, 5 W. S. (Sc.) 649; *Bliss v. Hall*, 5 Scott, 500; *Blunt v. Hay*, 4 Sandf. Ch. (N. Y.) 363.

² *Regina v. Wigg*, 2 Ld. Raym. 1163;

Commonwealth v. Van Sickle, 4 Penn. L. J. 164; *Smith v. McConathy*, 11 Mo. 517. In *Smith v. Payson*, 37 Me. 361, a pig-pen near a highway, which emitted noisome smells, to the annoyance of travelers, was held a common nuisance. *McCreadie v. McBrau*, 32 Jur. 184; *Aldred's Case*, 5 Coke, 59; *Rex v. White*, 1 Burr. 333; *Everett v. Grapes*, 3 L. T. (N. S.) Q. B. 669; *Chelsea Vestry v. King*, 34 L. J. (M. C.) 9; 1 Rolle's Abr. 88; 3 Stephen's N. P. 2362; *R. R.-Co. v. Grabel*, 50 Ill. 241; *Bishop v. Banks*, 33 Conn. 34; *State v. Koster*, 35 Iowa, 221.

person who should "keep, or suffer to be kept, any swine in the borough, between the 1st day of May and the 1st day of October, was wholly invalid, 'as the keeping of swine does not necessarily create a nuisance.'" In reference to swine styes, the same rule prevails as in reference to any other use of property. If they are in a location where the noxious smells actually emitted therefrom impair the comfortable enjoyment of property, or annoy the public, they are nuisances, otherwise not.

SEC. 519. Cattle-yards and pens when suffered to remain in an unclean or filthy condition have been held to be nuisances, when they impair the comfortable enjoyment of property by the stenches emanating therefrom, or when, by reason of excessive noise, they disturb the quiet of the neighborhood.¹

TANNERIES.

SEC. 520. *Tanneries* are regarded as among the class of trades that are *prima facie* nuisances, because of their liability to emit noxious smells. In *Rex v. Pappineau*, 1 Stra. 686, the defendant was indicted for carrying on the business of a tanner near a public highway, and his works were abated as a common nuisance.

In a recent case in New Jersey,² it was held that a tannery is not *per se* a nuisance, so as to warrant its abatement as such by the street commissioners or board of health, until it is adjudged to be inimical to health.

An interesting case recently came before the court of appeals in New York,³ in which the question of nuisance resulting from the operations of a tannery were considered. In that case the plaintiff was the owner of a lot in the city of Buffalo with two houses thereon. Upon a lot about seventy-five feet from the plaintiff's premises the defendant had a tannery, wherein he carried on the business of tanning hides. It appeared that in the operations of the business, offensive stenches were liberated to such extent as to impair the comfortable enjoyment of the plaintiff's houses to such an extent as nearly to render them

1. *Bishop v. Banks*, 33 Conn. 35; *Illinois Central Railroad Co. v. Grabel*, 50 Ill. 241; *Babcock v. New Jersey Stock Yard Co.*, 20 N. J. 296; *Ohio, etc., R. R. Co. v. Simon*, 40 Ind. 27. So the keeping of a dairy in a public place, that creates offensive

stenches, is a public nuisance, although kept as clean as possible. *State v. Ball*, 59 Mo. 321.

2. *State Marshal v. Street Commissioners of Trenton*, 36 N. J. 283.

3. *Francis v. Schoellkopf*, 53 N. Y. 153.

uninhabitable, and that, in consequence of the nuisance, she was unable for a part of the time to rent the premises at all, and when she did rent them, that she realized much less rent therefor than she would have received if the nuisance had not existed.

The court held that the plaintiff was entitled to recover the difference between the rental value with the nuisance there, and what she could obtain if they were free from it. It also appeared that offensive matter from the tannery was placed upon a vacant lot adjoining the defendant's works, which increased the nuisance, but there was no evidence that the defendant placed it there. Upon this point GROVER, J., said: "True, it was not directly proved that this was placed there by the defendant. But it was proved that it came from his tannery, where it was in his possession and control; and in the absence of proof as to how it came there, the presumption is, that it was placed there by him." Upon the trial of the case in the lower court, the defendant offered to show that since his tannery had been operated, it had contributed to enhance the value of the plaintiff's premises, and their rental value. This evidence was rejected, and in referring to this question the court say: "I do not understand by this that it was intended to show that the stench was not produced as was claimed by the plaintiff, but that in consequence of the number of persons employed by the defendant in the business, the demand for dwellings in the vicinity was increased, thereby increasing the commercial and rental value of such property in the vicinity. So understood, the rejection was proper."

For instances in which tanneries have been held nuisances, see the cases cited in the following note.¹

SOAP AND BONE BOILERIES.

SEC. 521. Soap boileries, or establishments where soap is manufactured from the bones and fat of animals by the process of boiling, are regarded as *prima facie* nuisances, and we find a

Ellis v. State, 7 Black. (Ind.) 534; 15 F. C. 535; Thomas v. Brackney, 17 Rex v. Pappineau, 1 Stra. 686; Francis v. Schoellkopf, 53 N. Y. 152; Fisher v. Clark, 41 Barb. (N. Y.) 332; Jones v. Powell, Hutt. 136; Scott v. Cox, Barb. (N. Y. S. C.) 654; 3 Blacks. 217; 3 Steph. N. P. 2362; Pinckney v. Ewens, 3 L. T. (N. S.) 781.

case as early as 1691,¹ in which it was held that such an establishment in Wood street, in London, was a common nuisance. It was urged as a defense in that case, that the trade was lawful and necessary, and JEFFRIES, C. J., said: "Though such a trade is honest and may be lawfully used, yet, if by its stench it be offensive to the neighbors, it is a nuisance." The reporter says that the court referred to a case where a calendarman, in London, in Broad street, was convicted before Lord HALE, for that the noise of his business disturbed the neighbors, and shook adjacent houses. Also the case of *Rex v. Jordan*, in which a brew-house on Ludgate hill was held a nuisance, and the defendant compelled to prostrate it or convert it to other purposes, for that such trades ought not to be carried on in the city, but in the outskirts thereof.

SEC. 522. In *Howard v. Lee*,² the plaintiff was the proprietor of a hotel on Broadway in the city of New York, called the Irving House. The defendant had for many years, and long before the Irving House was erected, carried on the business of making soap on Reade street, within less than a hundred feet of the plaintiff's hotel. His establishment had, for several years, been a subject of complaint in the neighborhood, which was closely built up and densely populated, but no legal proceedings had ever been commenced against the defendant therefor. During the prevalence of the cholera in 1849 the works had been very offensive to the plaintiff's guests, and many left his house in consequence. OAKLEY, C. J., in delivering the opinion of the court on a motion to dissolve the temporary injunction, said: "The court can prohibit trades of this character from being carried on in a great city, or in a dense population, on the broad principle that *all* trades that render the enjoyment of life and property uncomfortable must recede with the advance of population, and be conducted in the outskirts of the city or in the country. This is on the principle that every man must so use his property as not to injure the rights of his neighbor. * * * It is well settled in cases of this kind, that it is not necessary that

¹ *Rex v. Pierce*, 2 Shower, 327; Atty.-General v. Cleaver, 18 Vesey, 211.

² *Howard v. Lee*, 3 Sandf. (N. Y. S. C.) 281; *Dana v. Valentine*, 5 Metc. (Mass.) 8.

a trade should be injurious to health, to constitute a public nuisance, in order to have it restrained.

SEC. 523. In *Ballamy v. Comb*¹ it was held that an establishment near dwellings, for the roasting the black ashes of soap, emitting noxious and offensive smokes, was a nuisance.

In *Meigs v. Lester*² it was held that a bone-boiling establishment, the vapors and stench from which were annoying to the neighborhood, was a nuisance.

SEC 524. In *Radenhurst v. Coates*,³ the defendant carried on the business of a soap and candle manufacturer upon premises situated upon the north side of King street, in the eastern part of the city of Toronto. The plaintiff was the owner and occupier of two pieces of ground in the neighborhood, one of them used as a vegetable and pleasure garden adjoining the premises of the defendant. On the other was situated the plaintiff's dwelling-house, which is situated from 150 to 160 feet from the factory of the defendant. The bill alleged that noxious and offensive vapors and smoke were emitted from the defendant's factory during the process of his manufacture, and were carried to the plaintiff's premises. The defendant denied that noxious and offensive vapors from his factory were carried to the plaintiff's premises, at least to the extent charged, and attributed much of the annoyance felt by the plaintiff to other manufactories of various kinds in the neighborhood, though at a greater distance from the plaintiff's premises, and insisted upon the acquiescence of the plaintiff and of her late husband as disentitling her to an injunction.

SPRAGUE, V. C., in disposing of the case, said: "There is a good deal of evidence upon both sides, but upon the whole we think it is established that the vapors arising from the business carried on by the defendant are so offensive in degree, in frequency and in duration as to impair materially the ordinary comfort of life. Upon this point we have the evidence not only of the plaintiff herself and of her son-in-law, Mr. Grant, but of other persons of different classes of life in the neighborhood,

¹ *Ballamy v. Comb*, 17 F. C. (Sc.) 159.

² *Meigs v. Lester*, 23 N. J. 199.

³ *Radenhurst v. Coates*, 6 Grant's Ch (Ont.) 140.

some of them living at a greater distance from the defendant's premises than the plaintiff, and who describe the vapors from the defendant's factory in various terms, but generally as causing a stench of a very noisome and sickening description. There is some evidence against this, but upon the whole we think the fact proved, and to such an extent as to amount not only technically to a nuisance, but such as seriously to affect the comfort, if not the health of those residing in the immediate neighborhood and among them of the plaintiff. Indeed, one fact relied upon by the defendant, his having erected a very high chimney, and a vent or air hole to carry off the smoke and vapor from his factory, implies a consciousness that such smoke and vapor could taint and pollute the air unless so carried off. Upon the first point, therefore, our opinion is against the defendant.

Part of the plaintiff's case is to the effect that the business carried on by the defendant is so offensive as to make the plaintiff's premises a most undesirable residence, so much so that persons of a class who would ordinarily inhabit such premises would not occupy them, even if they could be had rent free. The defendant's counsel seems to have understood the plaintiff as using this evidence to show that the acts complained of diminished the value of her premises, and to have made that circumstance a ground for objecting to the defendant's business as a nuisance, and he objects that it cannot so be used. If offered in this view he is probably right, but in another view it is important—that is, as a matter of evidence, tending to show how great is the inconvenience caused to those residing in the plaintiff's house, which, though otherwise a very desirable residence, is rendered almost worthless as a residence by the acts complained of.

With regard to the acquiescence alleged, the defendant states that he is corroborated by the affidavit of his father; that he commenced his present business on the premises in question in October, 1848, and has carried it on there ever since; that he at first leased the premises for one year, and afterward for a term of five or seven years at his option; that he has from time to time since the commencement of his occupation expended large sums of money in the building and erection of the boilers, furnaces, vats, receivers, etc.; and in the summer of 1849 erected a very high

chimney — higher, as he believes, than any other manufactory of the same kind hath in the city — for the purpose of more readily carrying off the smoke from his premises ; that the improvements he has made have had the effect of diminishing the smells which will at times issue or arise from the main factory, and which he says have been less this year than formerly, but he does not admit that they ever caused inconvenience to the plaintiff. He states that the late Mr. Radenhurst saw his improvements in progress without any remonstrance or objection, and frequently used some of the refuse from the factory for manure.

I observe that in stating the improvements, the last stated is the building of the high chimney in 1849, when he was, as I understand from his statement, a tenant, under a lease for one year only. What portion of the expense was incurred in the setting up of trade fixtures, and what otherwise is not very material, for it is not made to appear that Mr. Radenhurst knew that such a manufactory would emit noxious and offensive vapors, and looking at the defendant's present account of it, it is most improbable that any inquiry of him upon that point would have produced any such information. But apart from that, we are not of opinion that where there is no concealment of any fact by the party afterward objecting and especially when, as in the present case, the nature of the business to be carried on is best known to the party incurring the expense, the mere forbearance to warn him that his proceedings will be objected to will disentitle a party injuriously affected to relief.

The omission to warn the defendant, and the subsequent forbearance to take any proceedings against him, are relied upon as disintitling the plaintiff to relief. We do not think it is shown by the evidence that there was any encouragement on the part of Mr. Radenhurst, or that the defendant took any step or incurred any expense upon the faith of any thing said or done by Mr. Radenhurst, or that Mr. Radenhurst's conduct had any influence in determining the defendant to do any thing in regard to his factory. Putting it most strongly for the defendant that the evidence will warrant, there was an acquiescence of several years in the defendant's carrying on his business as he did carry it on, but nothing more.

It is a plain common-law right to have the free use of the air in its natural unpolluted state, and an acquiescence in its being polluted for any period short of twenty years will not bar that right. To bar that right within a shorter period, there must be such encouragement or other act by the party afterward complaining as to make it a fraud in him to object.

With regard to the point that the plaintiff should have established her legal right by action at law before coming to this court, it does not seem to be now since the passing of the general order upon this subject, that it can be taken as an objection. It is only a matter for the discretion of the court, and we do not think it necessary to put the plaintiff to her action at law, and the less so as the fact of public nuisance has been established against the defendant; first, upon summary proceedings before a magistrate, and afterward by the verdict of a jury."

SEC. 525. *Any business in which animal matter is used in such a way as to emit noxious vapors or offensive stench and smells to the annoyance of others, is regarded as a nuisance.*

In *Jamieson v. Hillcote*,¹ an interdict was issued against an establishment carried on within 300 yards of Portobello, and adjacent to the road to Edinburgh, in which the blood of animals was prepared, as an ingredient of Prussian blue.

In *Charity v. Riddle*,² it was held that an establishment for the manufacture of glue from animal matter, in Glasgow, which produced offensive and stinking vapors, was a nuisance, and the defendant having gained a prescriptive right to exercise his trade there, by long user, was, nevertheless, restrained from enlarging his works so as to increase the nuisance, or from changing their location, so as to bring them nearer to dwellings or streets.

In *Farquhar v. Watson*,³ an establishment for the preparation of tripe for market, by reason of the offensive vapors emitted therefrom, was held a nuisance.

LIVERY STABLES.

SEC. 526. Livery stables may be so located as to become nui-

¹ *Jamieson v. Hillcote*, 12 F. C. (Sc.) 424.

² *Charity v. Riddle*, 14 F. C. (Sc.) 237; *Colville v. Middletown*, 19 id. 339.

³ *Farquhar v. Watson*, 17 F. C. (Sc.) 692; *Glasgow Water Wrks Co. v. Aird*, 18 id. 450.

sances,¹ and indeed when located near dwellings in large cities or towns, they may as fairly be regarded as *prima facie* nuisances as any of the noxious trades previously enumerated.² In recognition of this fact, a livery stable located near a hotel has been held a nuisance when by reason of the stenches arising therefrom it became offensive,³ or when located near dwellings so that the noise of the horses disturbed the inmates and broke their rest,⁴ and when it was so negligently and improperly conducted as to disturb the comfortable enjoyment of life and property in its vicinity.⁵

SEC. 527. In actions for injuries resulting from a livery stable, as a nuisance, it is sufficient to establish the injury, either from offensive smells, noise, or the unwarrantable collection of flies;⁶ and it is no defense for the defendant that his stable is well and properly built, is located in as unobjectionable a locality as any in the city, and is properly kept and managed. Neither is it competent for him to show that other stables similarly situated do not create serious annoyance to neighboring dwellings. If, in point of fact, injury results to others, that is clearly traceable to the stable as the promoting cause, it is a nuisance, even though no other stable ever produced such results.⁷

SEC. 528. In *Dargan v. Waddell*,⁸ which was an action for injuries resulting to the plaintiff by reason of the noise and offensive stenches arising from the defendant's livery stable, the court said, "A livery stable is not *per se* a nuisance, but if so built, so kept and so used as to destroy the comfort of persons occupying adjoining premises, and impair their value as places of habitation; or if the adjacent proprietors are annoyed by it in any way that could be avoided, it becomes an actionable nuisance."

¹ *Burdett v. Swenson*, 17 Texas, 489; *Dargan v. Waddell*, 9 Ired. (N. C.) 244.

² *Kirkman v. Handy*, 11 Humph. (Tenn.) 406; *Coker v. Birge*, 9 Ga. 425; *Harrison v. Brooks*, 20 id. 537; *Morris v. Brower*, Anthon's N. P. (N. Y.) 368; *Aldrich v. Howard*, 4 Ames (R. I.), 94; *Aldrich v. Howard*, 8 R. I. 246.

³ *Aldrich v. Howard*, 8 R. I. 246.

⁴ *Dargan v. Waddell*, 9 Ired. (N. C.) 244.

⁵ *Morris v. Brower*, Anthon's N. P. (N. Y.) 368.

⁶ *Kirkman v. Handy*, 11 Humph. (Tenn.) 406; *Aldrich v. Howard*, 8 R. I. 246.

⁷ *Aldrich v. Howard*, 8 R. I. 246.

⁸ *Dargan v. Waddell*, 9 Ired. (N. C.) 244.

SEC. 529. Not only may a livery stable become a nuisance by improper location and offensive or annoying results, but it is held that *any* private stable or barn may be so located with reference to the dwellings or places of business of others, and be so improperly kept and conducted, as to become an actionable nuisance.¹ Even in the ordinary uses of property, in its use for purposes that are regarded as incident thereto, a person is bound to prevent such use from becoming a nuisance to others, if possible. A man has no right to erect a barn for the keeping of horses or cattle so near to his neighbor's dwelling as to disturb the rest of those residing there, by the noises produced by the animals kept there at night,² or to manage it in such a way as to permit offensive stench to emanate therefrom and float over his neighbor's premises, to his serious annoyance and discomfort. At his peril he is bound to guard against these results, except such as are accidental, and do not arise from any fault or neglect on his part.³ The rule, as laid down in the case cited below, is that "if the defendant so constructed and adapted the barn that in its ordinary use it would be injurious and offensive to the plaintiff, and cast unwholesome odors into his house, he is liable for the nuisance, although the premises upon which the barn stood, were in the possession of a tenant."⁴

SEC. 530. There are a multitude of trades and uses of property that have been held nuisances, by reason of the corruption of the atmosphere thereby with noisome and offensive smells, such as breweries,⁵ bone mills,⁶ gas works,⁷ mill dams,⁸ distilleries,⁹ blacksmith shops,¹⁰ dwelling-houses carelessly and negligently kept and

¹ Pickard v. Collins, 23 Barb. (N. Y. S. C.) 444; see Curtis v. Winslow, 36 Vt. 690.

² Pickard v. Collins, 23 Barb. (N. Y. S. C.) 444; Draper v. Sperry, 4 L. T. (N. S.) 365.

³ Id.

⁴ Jones v. Powell, Palm. 587; Rex v. Morris, Ventris, 26; Viner's Abr., 16th vol., p. 27.

⁵ Anderson v. Burnett, 22 Jur. 5.

⁶ Broadbent v. Imperial Gas Co., 7

De G. M. & G. 436; Watson v. Gas Co., 6 Upper Canada Rep. 262.

⁷ Townsend v. People, 3 Hill (N. Y.), 479; Rogers v. Barker, 31 Barb. (N. Y. S. C.) 347; Spencer v. Com, 2 Leigh (Va.), 759; Munson v. People, 5 Parker's Cr. (N. Y.) 16; Rooker v. Perkins, 14 Wis. 79.

⁸ Smith v. McConathy, 11 Miss. 517; Richards' Case, 6 City Hall Rec. (N. Y.) 61.

⁹ Whitney v. Bartholomew, 21 Conn. 81.

allowed to become filthy in populous localities,' chemical works,' petroleum refineries,' poudrette works,' works for deodorizing night soil,' depositing manure near a dwelling,' boiling horse flesh or carrion near one's dwelling,' the use of fuel producing stinking smoke;' veterinary stables where horses' hoofs are burned;' ditch, where water is collected and allowed to become stagnant;' depositing decayed vegetable matter near dwellings or in public places;' a dye house;' or any use of property by a trade or otherwise that impairs the comfortable enjoyment of life, by sending offensive smells over the premises of another.'

¹ *Ferguson v. Selma*, 43 Ala. 388; *State v. Purse*, 4 McCord (S. C.), 472; *Meeker v. Van Rensselaer*, 15 Wend. (N. Y.) 337; 19 *Viner's Abr.* 23; 2 *Hawkins' P. C.* 199; *Rex v. Brown*, Pasch. 26; 10 *Car. B. R.*

² *Commonwealth v. Rumford Chemical Works*, 14 Gray (Mass.), 231; *Rex v. White*, 1 Burr. 333; *Fletcher v. Rylands*, 1 L. R. (Exch.) 284.

³ *Commonwealth v. Kidder*, 107 Mass. 188.

⁴ *Poudrette Co. v. Van Keuren*, 23 N. J. 255.

⁵ *Knight v. Gardner*, 19 L. T. (N. S.) 773.

⁶ *Savage v. Board of Health*, 12 Barb. (N. Y. S. C.) 559.

⁷ *Grindley v. Booth*, 12 L. T. (N. S.) 469.

⁸ *James v. Powell*, Hutt, 136.

⁹ *Gullick v. Trunlett*, 30 Weekly Rep. 358.

¹⁰ *Shaw v. Cumiskey*, 7 Pick. (Mass.) 76.

¹¹ *Rochester v. Collins*, 12 Barb. (N. Y. S. C.) 559.

¹² *Aldred's Case*, 5 Coke, 59; 19 *Viner's Abr.* 27.

¹³ *Knight v. Gardner*, 19 L. T. (N. S.) 673, deodorizing night soil; *Rex v. Niel*, 2 C. & P. 485, varnish works; *Rex v. Cross*, 2 C. & P. 488, slaughter-house; *Rex v. Watts*, C. & P., slaughter-house; *Catlin v. Valentine*, 9 Paige's Ch. (N. Y.) 574, slaughter-house; *Peck v. Elder*, 3 Sandf. (N. Y. S. C.) 126, fat boiling; *Howard v. Lee*, 3 id. 281, soap boiling; *Dubois v. Budlong*, 15 Abb. Pr. (N. Y.) 445, fat boiling; *Blunt v. Hay*, 4 Sandf. Ch. (N. Y.) soap boiling; *Prescott's Case*, 2 City Hall Recorder (N. Y. C. P.), 161; *Richards' Case*, 6 id. 61; *Cropsey v. Murphy*, 1 Hilt. (N.

Y. C. P.) 126, fat boiling; *Morris v. Brower*, Anthon's N. P. (N. Y.) 368; *Pottstown Gas Co. v. Murphy*, 39 Penn. St. 257, gas works; *Columbus Gas Co. v. Freeland*, 12 Ohio St. 392, gas works; *Rogers v. Parker*, 31 Barb. (N. Y. S. C.) 347; *Hackney v. State*, 8 Ind. 494, slaughter-house; *Kirkman v. Handy*, 11 Humph. (Tenn.) 406, livery stable; *Burdett v. Sweetson*, 17 Texas, 489, livery stable; *Douglass v. State*, 4 Wis. 387, stagnant water; *Commonwealth v. Gallagher*, 1 Allen (Mass.), 592; *Ashbrook v. Commonwealth*, 1 Bush (Ky.) 139, slaughter-house; *Commonwealth v. Brown*, 13 Met. (Mass.) 365, neat's foot oil; *Ellis v. State*, 7 Blackford (Ind.), 534, slaughter-house; *Reed v. People*, 1 Parker's Cr. (N. Y.) 481, privy; *Coker v. Birge*, 10 Ga. 336, livery stable; *Story v. Hammond*, 4 Ohio St. 376; *Taylor v. People*, 6 Parker's Cr. (N. Y.) 347, slaughter-house; *Munson v. People*, 5 id. 16, mill dam; *State v. Payson*, 37 Me. 361, pig-sty; *People v. Gas Co.*, 64 Barb. (N. Y. S. C.) gas works; *Regina v. Wigg* 2 Ld. Raym. 1163, pig-sty; *Morley v. Pragnall*, Cro. Car. 510, tallow chandler; *Allen v. State*, 34 Texas, 230, tallow factory; *Francis v. Schoellkopf*, 53 N. Y. 152, tannery; *Rex v. Pierce*, 2 Shower, 327, soap boiling; *Meigs v. Lester*, 23 N. J. 194, bone boiling; *Fay v. Whitman*, 100 Mass. 597, slaughter-house; *Commonwealth v. Kidder*, 107 Mass. 188, petroleum refinery; *Brady v. Weeks*, 3 Barb. (N. Y. S. C.) 157, slaughter-house; *Dargan v. Waddell*, 9 Ired. (N. C.) 244, livery stable; *Shaw v. Cumiskey*, 7 Pick. (Mass.) 76, stagnant water in ditch; *Rex v. Pappineau*, 2 Strange 686, tannery; *Rex v. White*, 1 Bur-

SEC. 531. Without stopping to enumerate further in detail the particular trades, or uses of property, which have been held nuisances upon a special state of facts, I will state here, that *any* use of property, or *any* trade, that corrupts the atmosphere with

rows, 333, chemical works; Broadbent v. Imperial Gas Co., 7 De G. & G. 436, gas works; Watson v. Gas Co., Upper Canada Rep. 263, gas works; Regina v. Bruce, 13 Lower Canada, 313; Regina v. Micklin, 6 W.W. A. B. L. 68 (Victoria), bone mill; Smith v. Humbert, 2 Kerr (N. B.), 602, privy; McCready v. McBrann, 32 Jur. 184, pigsty; Portland v. Henderson, 27 id. 241, slaughter-house; Commonwealth v. Upton, 14 Gray (Mass.), 231, slaughter-house; Swinton v. Pedie, McL. & R. 1018, slaughter-house; Trotter v. Farnie, 5 W. S. (Sc.) 649, whale blubber; Rooker v. Perkins, 14 Wis. 79, stagnant water; Commonwealth v. Webb, 6 Rand (Va.), 726, stagnant water; Spencer v. Commonwealth 2 Leigh (Va.) 759, stagnant water; Com. v. Van Sickle, 4 Penn. L. J. 164, pig-sty; Miller v. Trueheart, 4 Leigh (Va.), stagnant water; Green v. Savannah, 6 Ga. 1, stagnant water; Norwood v. Dickey, 18 Ga. 528; Coker v. Birge, 9 Ga. 425, livery stable; Harrison v. Brooks, 20 Ga. 537, livery stable; Bishop v. Banks, 33 Conn. 121, slaughter-house; Whitney v. Bartholomew, 21 Conn. 218, blacksmith shop; Smith v. McConathy, 9 Miss. 517, distillery; Neal v. Henry, Meigs (Tenn.), 17, stagnant water; Attorney-General v. Steward, 5 N. J. 415, slaughter-house; Cleveland v. Citizens' Gas-light Co., 20 N. J. 201, gas works; Poudrette Co. v. Van Keuren, 23 N. J. 255; Poudrette works; Flight v. Thomas, 10 Ad. & El., manufacture of mixen; Rex v. Pedley, 1 Ad. & El. 822, privy; Dana v. Valentine, 5 Met. (Mass.) 8, soap and candle manufactory; Roberts v. Clarke, 17 L. T. (N. S.) 384, brick kiln burned with coal mixed with animal matter; Grindley v. Booth, 12 L. T. (N. S.) 469, boiling horse flesh and carrion; Pinckney v. Ewens, 3 L. T. (N. S.) 741, tannery; Manhattan Gas Co. v. Barker, 36 How. Pr. (N. Y.) 238, gas works; Rhodes v. Whitehead, 27 Texas, 304, stagnant water; Stynan v. Hutchinson, 2 Selwyn, 1047, tobacco mill; Aldred's Case, 5 Coke, 59, pigsty, dye-house; Walter v. Selfe, 4

Eng. Law & Eq. 20, vapors from brick kiln; R. R. Co. v. Grabel, 50 Ill. 241 cattle pens; Morley v. Pragnall, Cro. Car. 510, tallow furnace; Rex v. Morris, Ventris, 26, brewery; Kennedy v. Phelps, 10 La. An. 227, place for curing hides; Com. v. Rumford Chemical Works, 14 Gray (Mass.), 231; Attorney-General v. Steward, 20 N. J. 415, slaughter-house, blood from which enters stream; Rex v. Pedley, 1 Ad. & El. 822, privy; Scott v. Leith Commissioners of Police, 4 F. 1068; Hart v. Taylor, 4 Mur. (Sc.) 313; Glasgow Water-works Co. v. Ward, 18 F. C. (Sc.) 450, glue works; Colville v. Middletown, 19 id. (Sc.) 339, glue works; Ballamy v. Comb, 17 id. (Sc.) 159, burning black ashes of soap; Gullick v. Tremlett, 20 W. R. 358, burning horses' hoots; Knight v. Gardner, 19 L. T. (N. S.) 673, deodorizing night soil; Kelt v. Lindsay, 17 F. C. (Sc.) 677, slaughter-house; Arnot v. Brown, 1 Stuart (Sc.) 694, candle factory; Farquhar v. Watson, 17 F. C. (Sc.) 692, preparing tripe; Charity v. Riddle, 14 id. (Sc.) 237, glue works; Jamieson v. Hillcote, 12 id. (Sc.) 424, preparing blood for Prussian blue; Commonwealth v. Reed, 34 Penn. St. 275, stagnant water; Harris v. Thompson, 9 Barb. (N. Y. S. C.) 350, stagnant water; Pickard v. Collins, 23 id. 444, offensive smells from barn; Townsend v. People, 3 Hill (N. Y.) 479, stagnant water; State v. Stoughton, 5 Wis. 291, stagnant water; Schuster v. Board of Health, 49 Barb. (N. Y. S. C.) 450, slaughter house; Savage v. Board of Health, 33 id. 344, depositing manure; Rochester v. Collins, 12 id. 559, decayed vegetables near dwellings; Howell v. McCoy, 3 Rawle (Pa.), 376, pollution of water and offensive smell from tannery; Beach v. People, 11 Mich. 106, stagnant water; Wolcott v. Mellick, 3 Stockt. (N. J.) 204; State v. Wilson, 48 N. H. 415, slaughter house; State v. Shelbyville, 4 Sneed (Tenn.), 176, slaughter house; Day v. State, 4 Wis. 124; Babcock v. N. J. Stock Yard Co., 20 N. J. 296; a warehouse for storing guano, Ruff v. Phillips, 60 Ga. 130; a privy that corrupts the water of a well, Wahle v. Reinbach, 76 Ill. 322; lime kiln, Slight v. Gutzlaff, 35 Wis. 675.

smoke, noxious vapors, noisome smells, dust or other substances, or gases producing injury to property or to health, or impairing the comfortable enjoyment of property, is a nuisance, and it is a matter of small consequence at law, whether it has ever been held a nuisance before or not; if it amounts to an actual invasion of another's right, it is actionable, even if it has never previously been the subject-matter of an action. At law, every case stands or falls upon its own merits, and, if the special facts establish the nuisance, it will be so held, although never so held before; and if they do not clearly establish the nuisance, the action must fail, although that particular use of property has been held a nuisance in a thousand instances.

SEC. 532. It is not every trifling impregnation of the atmosphere that creates a nuisance. There are many uses of property, for the ordinary purposes of life, that produce more or less of discomfort, and where these are necessary incidents of the ordinary use of property, and are only occasional, and produce no real or substantial damage, they must be borne with as results that cannot reasonably be avoided. But where, even in the use of property for ordinary purposes, the ill results are of a *permanent* or frequent, rather than of an *occasional*, character; or where the ordinary use is unreasonable, in view of the location and the rights of others, the use is a nuisance.¹ So, too, the damage must be *real*, not *fanciful*, not a mere annoyance to a person of fastidious tastes and habits, but such *sensible* and *real* damage as a *sensible person*, if subjected to it, would find injurious to him.²

SEC. 533. It is a mere question of injury to a right. If a substantial right is invaded, time is not an element to be considered, so far as the right of recovery is concerned, but is of importance upon the question of damages.³ In *Ross v. Butler*, 4 C. E. Green (N. J.), 294, it was held, that works emitting dense volumes of smoke, laden with cinders, in a populous locality, where the smoke and cinders fell upon adjoining dwellings and penetrated them,

¹ *Fay v. Whitman*, 100 Mass. 76; *Cleaveland v. Citizens' Gas-light Co.*, *Pickard v. Collins*, 23 Barb. (N. Y.) 444; 20 N. J. 201; *Rex v. Tindall*, 4 Ad. & Robinson *v. Baugh*, 31 Mich. 290. El. 143.

² *Scott v. Firth*, 10 L. T. (N. S.) 240 ³ *Attorney-General v. Sheffield Gas*
Walter v. Selfe, 4 Eng. L. & Eq. 20. *Co.*, 22 Eng. L. & Eq. 200.

producing material annoyance and discomfort, were a nuisance, and should be restrained as such, even though they were thus used only two or three times a month, and then only for an hour or two each time.¹

In *Attorney-General v. Sheffield Gas Co.*, 19 Eng. L. & Eq. 639, a bill was brought by the attorney-general, to restrain the defendants from taking up the pavements in Sheffield, and digging trenches therein, for the purpose of laying down gas-pipes, for the purpose of supplying the town with gas. It appeared that the defendants contemplated laying down about seventy miles of pipe, which would necessitate the digging of trenches in nearly all the streets in the town. It was claimed, by the defendants, that they would not have any part of one street open over two days at a time, and, usually, not over two hours, and that the inconvenience would thus be small and trifling.

Sir G. J. TURNER, L. J., in delivering an opinion denying the injunction, among other reasons for denying the relief prayed for in the bill, said, "As to laying down the pipes, that is a case of mere temporary inconvenience, for when the pipes are laid down the work which has been done is entirely completed, it is done once for all. * * * The inconvenience will be temporary, applying only to a particular part of the town, not affecting the general body of the inhabitants to any extent that will render it inconvenient." Thus it will be seen that the court in this case proceeded upon the ground that *time* is to be considered upon the question of granting an injunction to restrain a nuisance, and that, indeed, it is a question to be considered in determining whether any nuisance has been created. KNIGHT BRUCE, L. J., combatted this position of a majority of the court in an able opinion, in which he laid down the doctrine that *time* is not an element in determining the question, but that the real question to be considered is, whether the rights of individuals or the public have been violated. This case was heard in February, 1853, and the defendants having commenced operations, an indictment was obtained against them for creating a public nuisance by obstructing the public streets, and a verdict of *guilty* was

¹ In *Commonwealth v. Gallagher*, 1 Allen (Mass.), 592, it was held, that the maintenance of a nuisance for only two hours is actionable.

rendered against them. Upon appeal the question was heard in Queen's Bench in June, 1853, and the verdict was sustained, the court holding that even a *temporary* obstruction of the streets for purposes not incident to their use, is an indictable nuisance.

SEC. 534. In the case of nuisances created by trades or uses of property that create a nuisance by the production of smoke, noxious vapors or noisome smells, which are sent over public streets as well as the premises of private individuals, or that affect the premises of a large number of individuals injuriously, and thus become a *public* nuisance, the question has been much mooted whether private actions, for injuries resulting from the works, can be maintained. It is now well settled by the courts, both in this country and England, that private injuries resulting from smoke, noxious vapors, noisome smells, noise, or any other cause creating a public nuisance, are a proper ground for private actions, and that an interference with the comfortable enjoyment of property within the sphere of the nuisance, is a sufficient special and particular damage, to uphold individual actions for damages.

SEC. 535. In *Francis v. Schoellkopf*, 53 N. Y. 152, GROVER, J., in language at once characteristic, and pregnant with that vigorous common sense that is evinced in all of his opinions, thus disposes of this fallacy: "The idea that if, by a wrongful act, a serious injury is inflicted upon a single individual, a recovery may be had therefor against the wrong-doer, and that if, by the same act, numbers are so injured, no recovery can be had by any one, *is absurd*. This, stripped of its verbiage, is the ground of the motion. It is said that holding the defendant liable to respond in damages to each one injured, will lead to a multiplicity of suits. This is true, but it is no defense to a wrong-doer when called upon to compensate for the damages sustained by his wrongful act, to show that he, by the same act, inflicted a like injury upon a large number of persons. The position is not sustained by any authority. * * * The rule is that one erecting or maintaining a common nuisance is not liable to an action at the suit of one who has sustained no damage therefrom, except such as is

common to the entire community, yet he is liable at the suit of one who has sustained damage peculiar to himself, no matter how numerous the persons may be who have sustained this peculiar damage, each is entitled to compensation for his injury." The action in this case was for injuries arising from noxious smells emitted from the defendant's tannery.¹

In *Ottawa Gas Co. v. Thompson*, 39 Ill. 598, the action was brought to recover for damages sustained by the plaintiff in consequence of the discomfort produced in the occupancy of his premises by reason of the noxious smells arising from the defendant's gas works. It was shown that the works were a public nuisance, and it was objected to a recovery that an action for private damages could not be maintained, in that, discomfort produced in the occupancy of the premises was not such special damages as entitled a private person to maintain an action. But the court held that the action *could* be maintained, and that the rendering of one's dwelling uncomfortable, by sending into it noxious smells from a public nuisance, is a special injury such as is not common to all the public.

In *Wesson v. Washburn Iron Co.*, 13 Allen (Mass.), 95, the same question arose in an action for an injury to the enjoyment of an inn, by sending into it smoke and dust from the defendants' iron works. It was shown that the works were a common nuisance, and it was insisted that no recovery could be had for private damages sustained by the plaintiff therefrom in the manner charged in the declaration. But the court held that the action was maintainable, and in a very able and exhaustive opinion laid down the doctrine, that injuries to the comfortable enjoyment of real property from a public nuisance created by smoke, noxious vapors or noisome smells, raised such *special* and *particular* injuries as would sustain a private action.²

¹ The opinion of Lord ELLENBOROUGH in the case of *Rex v. Dewsnap*, 16 East, 196, exhibits equal severity in disposing of a similar question. See *infra*, sec. 538.

² In *Catlin v. Valentine*, 9 Paige (N. Y.), 574, a private action was sustained for injuries from a public nuisance, after the defendant had been indicted therefor. See 3 Johns. Cas. 91. Mills

v. Hall, 9 Wend. (N. Y.) 318, where the very ground upon which the action was upheld, was that the nuisance was public, so that the doctrine of prescription would not apply. In *Sampson v. Smith*, 8 Sim. 272, a private action for injuries arising from smoke, which was a public nuisance, was sustained, and Mr. KNIGHT BRUCE, afterward vice-chancellor, in his argu-

In *Peck v. Elder*, 3 Sandf. (N. Y.) 126, an action for an injunction at the suit of private persons was maintained, and a perpetual injunction granted, even though the nuisance was public, and even though the defendant was indicted and fined therefor, after the bringing of the bill, and before the final hearing.

SEC. 536. In *Soltan v. DeHeld*, 9 Eng. L. & Eq. 104, the question of the right of an individual to maintain an action for private damages, resulting to him from a public nuisance, was thoroughly discussed by KINDERSLEY, V. C., and, after an exhaustive review of all the English authorities, he lays down the doctrine that, where a person sustains a special damage from a public nuisance, whether by noise (as in the case he had in hand) or smoke, noxious vapors or noisome smells, or any other cause, he may maintain an action therefor, no matter how many may have sustained a like injury.

SEC. 537. This doctrine is not at all in conflict with the rule that "no man can have a private action for an injury that is common to all the public;" for, in such cases, the injury is *not* common, and cannot, by any process of reasoning, be said to be. A person residing, or having a place of business, within the immediate sphere of such a nuisance sustains injuries which the rest of the public, who merely suffer an annoyance when casually coming in contact with it, do not sustain. Persons owning property within the sphere of the nuisance sustain that damage which is incident to the deterioration of property in such localities and from such causes, and those residing or doing business there are subjected to a degree of annoyance and personal discomfort which is far in excess of that sustained by other members of the public. To them, and each of them, no matter how numerous, the nuisance is *private* as well as public. It inflicts upon them,

ment, laid down the doctrine which has been adopted by the courts ever since, as controlling this question. He said, "Every individual may maintain an action, or file a bill in respect of a public nuisance, provided he sustains any particular damage. The public and the private right have nothing to do with each other. Supposing the nuisance complained of in this bill is

a public nuisance, it is a *private nuisance also, and we do not apply for relief in respect of the public nuisance.* * * * Every individual who sustains an injury from a public nuisance may sue in respect of it, but when the subject of the complaint is *merely a public wrong*, an information must be filed by the attorney-general."

in all respects, all the injury requisite to enable them to maintain an action; and the fact that many more persons are similarly situated in reference to the same nuisance, in no measure operates to deprive them of their remedy. If they sit idly by, and allow the injury to go on, to be continued for a period of twenty years, their estates have become burdened with a servitude in favor of the wrong-doer, who, by reason of having injured a multitude of persons, has, if the contrary doctrine was to be held, tied the hands of each and all of them, and compelled them to allow their estates to be burdened with an easement in his favor. Such is not, and never has been, the law. All the cases, from *Morley v. Pragnall*, Cro. Car. 510, down to the present time, have proceeded upon the ground, that a person owning property, or residing or having a place of business, within the sphere of a public nuisance, arising from smoke, noxious vapors or noisome smells, thereby sustained a *special* and *particular* damage, apart from the rest of the public, that would uphold an action for private damages. In *Morley v. Pragnall*, the tallow factory, from which the injury proceeded, was situated upon a public street in London, and was clearly a public and indictable nuisance; yet an action was upheld for the private injury sustained by the plaintiff in the loss of his guests, and no question was raised as to his right of recovery, because the injury arose from a public nuisance.

SEC. 538. In the case of *The King v. Dewsnap*, 16 East, 196, which was an indictment for maintaining a steam-engine with a furnace for burning coal, whereby the air was charged with smoke and noxious smells, to the serious annoyance of the inhabitants, on a motion to set aside a rule for the taxation of costs in favor of the parties aggrieved by the nuisance, it was insisted that, this being a public nuisance, no one could be said to be specially grieved thereby. In disposing of this question, Lord ELLENBOROUGH said: "I did not expect that it would have been disputed at this day, though a nuisance may be public, yet that there may be a special grievance arising out of the common cause of injury, which presses more upon *particular* individuals than upon others not so immediately within the influences of it. In the case of stopping a common highway, which may affect all

the subjects, yet, if any person sustains a special injury from it, he has an action. *This* must necessarily be a special grievance to those who live within the direct influence of the nuisance, and are, therefore, parties aggrieved within the statute allowing such parties costs."

SEC. 539. In *Robbin's Case*, 16 Viner's Abr. 27, the injury to his goods was sustained by the maintenance by the defendant, of a brewery upon a public street in London, which was clearly a public nuisance; and yet no question was raised, in that case, as to the defendant's right of recovery, because many other traders might have sustained a similar injury, and that thus a multiplicity of actions would be encouraged. The plaintiff, in that case, had a verdict for £60, and the nuisance was upon *Bedford street*, which was full of traders.

SEC. 540. But without stopping to review the cases, it is now well settled in the courts of this country and England, that actions may be sustained for private damages resulting to individuals from public nuisances of smoke, vapors, noxious smells, noise or other cause, where, by reason of residence or ownership of property within the sphere of the nuisance, they are subjected to a greater damage than the rest of the public.¹

SEC. 541. Indictments may be maintained for a nuisance to the public, by smoke, noxious vapors, noisome smells or noise, where the trade or use of property producing it is located in a public place or near a public street or highway so as to prove offensive to the public in the exercise of their common rights. It is not

¹ *Walter v. Selfe*, 4 Eng. Law & Eq. 20; *Soltau v. De Held*, 9 id. 104; *Gas Co. v. Thompson*, 39 Ill. 168; *Francis v. Schoellkopf*, 53 N. Y. 156; *Wesson v. Washburn Iron Co.*, 13 Allen (Mass.), 95; *Brown v. Watrous*, 47 Me. 161, in which it was held that a person returning home over a highway which has been obstructed by another, whereby he is compelled to take a more circuitous route, is entitled to recover the damage thus sustained, and the fact that the road led to his home sustains the special claim for damages.

In *Powers v. Irish*, 23 Mich. 429, the plaintiff in passing over a navigable stream with rafts of lumber, was detained by the defendant's dam, so that he lost the sale of his lumber at such prices as he otherwise would have obtained. He recovered a verdict of \$4,000, the court holding that although the nuisance was public, yet the detention of a person passing over it with his property, was such special damage as would uphold an action.

necessary that the nuisance should be injurious to health, it is sufficient if it is offensive to the senses, and of such a character as, if applicable to an individual only, would uphold a private action for damages.¹

CHAPTER SIXTEENTH.

NOISE AND VIBRATION.

- SEC. 542.** Noise alone may creat a nuisance.
543. Trifling noises arising from lawful trades, exceptional.
544. Noises from trades carried on at unreasonable times.
545. Noise from livery stable.
546. From cattle pens.
547. From the ringing of bells.
548. Test of nuisance from noise.
549. Distinction between noises arising from lawful trades and noises created from mischievous or malicious motives.
550. Noisy trades a nuisance near dwellings, when ?
551. Blacksmith shop near dwellings.
552. Jarring, varying or agitating noises.
553. Noises from rolling mill.
554. Noisy trade in part of a dwelling-house.
555. Noise and vibration of a printing press in dwelling.
556. Same continued.
557. Establishment where iron or steel is hammered.
558. Forge in part of a dwelling-house.
559. Trip hammer.
560. Trip hammer near church and school.
561. Noise and vibration from railroad trains.
562. Noise from musical instruments.
563. Music and crowds near dwelling.
564. Rule in *Walker v. Brewster*.

¹ *Rex v. Niel*, 2 C. & P. 485; *Rex v. Cross*, id. 483; *Rex v. White*, 1 Bur. 333; *People v. Taylor*, 6 Park. Cr. (N. Y.) 347; *Prescott's Case*, 2 City Hall Recorder (N.Y.), 161; *Richard's Case*, 6 id. 61; *State v. Stoughton*, 5 Wis. 291; *Ashbrook v. State*, 1 Bush. (Ky.) 139; *Com. v. Upton*, 6 Gray. (Mass.), 476; *Com. v. Van Sickle*, 4 Penn. L. J. 164; *Com. v. Wilson*, 43 N. H. 140; *Townsend v. People*, 3 Hill (N.Y.), 479; *Munson v. People*, 5 Park. Cr. (N. Y.) 16; *Smith v. McConathy*, 11 Mo. 517; *State v. Payson*, 37 Me. 361; *Com. v. Reed*, 34 Penn. St. 275; *Com. v. Kidder*, 107 Mass. 188; *Com. v. Chemical Works*, 14 Gray (Mass.), 231.

- SEC. 565. Dwellings must not be devoted to use for noisy trades, when near others.
566. Use of part of dwelling for stable, noise from when a nuisance.
567. Noise in dwellings when a nuisance.
568. Injury must be established.
569. Presence of other nuisances no excuse, but locality and its uses may be shown.
570. Mere diminution of value of property, unless occasioned by unlawful uses of adjoining property, does not establish nuisance.
571. School-house near dwellings not necessarily a nuisance.
572. Rule in *McKeon v. See*.
573. Injuries to churches and other public buildings from noise, when actionable.
574. Persons disturbed sustaining no particular injury, cannot maintain an action.

SEC. 542. It is now well settled that *noise* alone, unaccompanied with smoke, noxious vapors or noisome smells, may create a nuisance and be the subject of an action at law for damages, in equity for an injunction, or of an indictment as a public offense.¹

In *Crump v. Lambert*,² that eminent English jurist, Lord ROMILLY, said: "With respect to the question of law, I consider it to be established by numerous decisions that smoke, unaccompanied with noise or noxious vapor, that *noise* alone, that offensive vapors alone, although not injurious to health, may severally constitute a nuisance to the owner of neighboring or adjoining property. That if they do so, substantial damages may be recovered at law, and that this court, if applied to, will restrain the continuance of the nuisance by injunction in all cases where substantial damages could be recovered at law."³ In this case, the injury resulted from a combination of smoke, noxious vapors and noise, which proceeded from the defendant's premises, adjoining the plaintiff's, at *Walsall*, in *Staffordshire*, where he carried on the business of manufacturing iron bedsteads. The doctrine, and indeed the *language* of this case upon this

¹ *Crump v. Lambert*, 3 L. R. (Eq. Cas.) 409; *Davidson v. Isham*, 1 Stockt. (N. J.) 186; *Rhodes v. Dunbar*, 58 Penn. St. 274; *Soltau v. De Held*, 9 Eng. Law & Eq. 104; *Roskell v. Whitworth*, 19 Weekly Rep. 804.

² *Crump v. Lambert*, 3 L. R. (Eq. Cas.) 409.

³ *Elliotson v. Feetham*, 2 Bing. (N. C.) 134; *Soltau v. De Held*, 2 Sim. (N. S.) 133.

point, has been adopted by several American cases,¹ and the principle that underlies the doctrine has long been recognized and acted on by the court.²

SEC. 543. It is not every trifling or occasional noise, such as is incident to an ordinary use of property, that creates a nuisance. A carpenter may pursue his trade at reasonable hours in any locality, and, in the reasonable exercise of his trade, in the erection of buildings, the noise usually incident thereto does not create an actionable nuisance, because people must yield somewhat of their rights that houses may be built; and some of their quiet and repose, so desirable in dwellings, must be given up, if they live in towns or in public places, that business may go on.³ But he may not establish a shop for the prosecution of his trade in the vicinity of dwellings, so as to seriously disturb the quiet and repose of those residing or doing business in the vicinity.

So when a lawful trade, productive of noise, that is not a nuisance, if confined to proper hours of the day, is exercised so near to dwellings, and at such *unusual* and *unreasonable* hours as to disturb the rest of those dwelling there, it is a nuisance, and as destructive to the comfort and health of a neighborhood as the most destructive vapors or smells.⁴

SEC. 544. In *Dennis v. Eokhardt*, 3 Grant (Penn. St.), 390, which was an application to restrain a tinman from exercising his trade in a building adjoining the plaintiff's house, because of the intense noise made thereby, and because the trade was exercised at unreasonable hours, THOMPSON, J., said: "The case in hand is

¹ *Davidson v. Isham*, 1 Stockt. (N. J.) 186; *Ross v. Butler*, 4 C. E. Green, 274.

² *Bradley v. Gill*, Lutwytych, 69; *Stynan v. Hutchinson*, 2 Selwyn's N. P. 1129; *Rex v. Pierce*, 2 Shower; *Dawson v. Moore*, 6 C. & P. 23; *Fish v. Dodge*, 4 Denio (N. Y.), 311; *Rex v. Smith*, 1 Strange, 704; *Com. v. Taylor*, 4 Binn. (Penn.) 277; *Davidson v. Isham*, 1 Stockt. (N. J.) 186.

³ *Duncan v. Hayes*, 22 N. J. 26; *Gaunt v. Finney*, 8 L. R. Ch. App. 8; 4 Moak's Eng. Rep. 718.

⁴ *Bradley v. Gill*, Lutwytych, 69; *Mum-*

ford v. Wolverhampton, etc., 1 H. & N. 34; *Davidson v. Isham*, 1 Stockt. (N. J.) 186; *Fish v. Dodge*, 4 Denio (N. Y.), 311; *Dargan v. Waddell*, 9 Ired. (N. C.) 244; *Martin v. Nutken*, 2 P. Wms. 266; *Roskell v. Whitworth*, 17 W. R. 804; *White v. Cohen*, 19 Eng. Law & Eq. 146; *Burdett v. Sweenson*, 17 Tex. 489; *Baptist Church v. R. R. Co.*, 5 Barb. (N. Y. S. C.) 79; *Baptist Church v. R. R. Co.*, 6 id. 313; *Soltan v. De Held*, 9 Eng. Law & Eq. 104; *Sparhawk v. Union R. R.*, Phila. Leg. In. (Penn.) Nov. 22, 1867; 54 Penn. St. 401.

the shop of a tinsmith and sheet-iron worker, who, it seems, has erected his shop, a very loose, *thin* building, made of boards, some eight feet from the back building and sleeping rooms of the complainant, and there carries on work, generally beginning in the morning before or by daylight, and resuming it again in the evening at or about 8 o'clock and keeping it up till 11 o'clock at night, having, generally, employment elsewhere during the day. The noise of hammering and pounding in such an establishment, we well know, is usually very great, and the affidavits describe it as intolerable in this instance; so much so, that the complainant and his family can hardly hear each other converse; have been compelled to abandon their chambers next to the shop, and are every night and morning deprived of their rest by the persistent hammering of the defendant. * * * I have no doubt that these noises are a nuisance, if a nuisance can be created by such means. * * * We have many cases in the books, English and American, of recoveries against lawful establishments, manufactories and the like, on account of annoyances from noise. Such recovery could only be had on the ground of nuisance."

SEC. 545. In *Dargan v. Waddell*,¹ an action was brought against the defendant for injuries resulting to the plaintiff from the noise made by the defendant's horses by stamping at night in his livery stable, situated near the plaintiff's dwelling. A verdict was rendered for the plaintiff, which was upheld by the court on appeal.

SEC. 546. In *Bishop v. Banks*, 33 Conn. 121, the plaintiff brought an action for damages, among other causes, arising from the noise made by the bleating of calves and other animals at night in the cattle-pen of the defendant, near the plaintiff's dwelling, by reason of which his family was disturbed and broken of its rest. The court held that this was an actionable nuisance.

SEC. 547. In *Soltan v. De Held*, 9 Eng. L. & Eq. 104, which is justly regarded as a leading case upon the law of nuisances as

¹ *Dargan v. Waddell*, 9 Ired. (N. C.) 244.

applicable to noise, the defendant was restrained from ringing the bells of a church in a building adjoining the plaintiff's dwelling-house, upon the ground that the noise of the bells was a nuisance to the plaintiff and his family. The facts of the case were briefly as follows: The plaintiff was the tenant for an unexpired term of a part of a mansion-house, which was divided into two dwellings, with no party-wall between them. That, in 1848, the other dwelling-house was purchased and converted into a church, called the "St. Mary's Catholic Chapel." A wooden frame was erected on the roof of the house, and a bell was placed therein, which was rung five days in the week, five times each day, and continued for about ten minutes at each ringing, and commencing, usually, as early as five o'clock in the morning. In May, 1851, a church, capable of holding 400 persons, was erected on the ground attached to the premises so used as a chapel, with a steeple 100 feet high, in which six bells were placed, and, on occasions when the church was open, were rung nearly the whole day. In June, 1851, the plaintiff brought a suit at law against the defendant for the nuisance, and recovered a verdict of 40*s.* damages. Upon this state of facts, KINDERSLEY, V. C., granted an injunction, restraining the defendant, who was the superintendent of the religious ceremonies carried on in the church, from ringing the bells so as to occasion any nuisance, annoyance or disturbance to the plaintiff's family residing in the dwelling-house mentioned in the bill. In commenting upon the annoyance arising from the ringing of bells in a building located with reference to a dwelling, as the dwelling in this case, was to the church in which the bells complained of were rung, he said: "Now, a chime of bells may be, and no doubt is, an extreme nuisance; and, perhaps, an intolerable nuisance to a person who lives within a very few feet or yards of those bells; but to a person who lives at a distance from them, although he is within reach of the sound, though he is within the sphere of their operations, within the influence of their effect, so far from its being a nuisance, an inconvenience, it may be a positive pleasure."¹

SEC. 548. The real test as to whether a noisy trade is a nuisance in a particular locality, and to a particular person in the

1. A similar rule was adopted in a case recently heard in the Court of Common Pleas in Philadelphia, in Feb., 1877. *Harrison v. St. Mark's Church*. Not yet reported.

enjoyment of his property, is, whether it is of such a character as would be likely to be physically annoying to a person of ordinary sensibilities,¹ or whether it is carried on at such unreasonable hours as to disturb the repose of people dwelling within its sphere. In determining this question, regard is not always to be had so much to the quantity, as to the quality of the noise. A noise may be comparatively slight, such as arises from the filing of some classes of metals or substances, and yet so affect the nervous system as to produce absolute physical pain in persons of ordinary sensibilities, while the heavy blows of a ponderous trip-hammer might produce no unpleasant sensations whatever.² Therefore, regard is always to be had to the character or quality (so to speak) of the noise, as well as the quantity and the time during which it exists.³

The matter is to be looked at reasonably, and, in view of the location, and all the surrounding circumstances, the jury are to say whether the noise complained of amounts to a nuisance; to such an injury as a reasonable person, under all the circumstances, ought not reasonably be subjected to.

SEC. 549. A distinction is also made between noises arising from a lawful trade, and those arising from malicious or mischievous motives, or such as are produced for no useful purpose.⁴ The music of a hand-organ or a brass band may, for a short time, be pleasant to the ear; but, if kept up for undue periods of time, it becomes a serious annoyance, productive of absolute physical discomfort and an intolerable nuisance, and would be actionable as such. In *Rex v. Smith*,⁵ the defendant was indicted for a nuisance, by making a loud noise with a speaking-trumpet in the night-time, whereby the neighborhood was disturbed, and the indictment was sustained, and the conviction upheld. In *Commonwealth v. Taylor*, 5 Binn. (Penn.) 277, the defendant broke into

¹ *Davidson v. Isham*, 1 Stockt. (N. J.) 186.

² *Dargan v. Waddell*, 9 Ired. (N. C.) 244; *Dennis v. Eckhardt*, 3 Grant (Penn. St.), 390; *Bishop v. Banks*, 33 Conn. 121.

³ *Dennis v. Eckhardt*, 3 Grant (Penn.), 390; *Dargan v. Waddell*, 9 Ired. (N. C.) 244.

⁴ Lord CRANWORTH, in *Attorney-General v. Sheffield Gas Co.*, 19 Eng. L. & Eq. 639; *Walker v. Brewster*, 5 L. R. (Eq. Cas.) 31; *Soltan v. De Held*, 9 Eng. L. & Eq. 104; *Inchbald v. Barrington*, 4 L. R. (Ch. App.) 488.

⁵ *Rex v. Smith*, 1 Stra. 704; *Backus v. State*, 4 Ind. 114; *Commonwealth v. Taylor*, 5 Binn. (Penn.) 277.

a house and made a great noise, frightening the inmates so that the wife of one of the residents there miscarried. He was indicted for a nuisance, and, being convicted, the conviction was sustained. It would hardly be advisable, however, to hazard the experiment of seeking a conviction under similar circumstances at the present day, as by no possible process of reasoning can such an offense be construed as a public nuisance. If the noise had been made in the public street, so as to be a public annoyance, the conviction might properly have been upheld; but, being confined to a single dwelling-house, it was in no sense, within the rule, applicable to this class of offenses.

In *Carrington v. Tylor*, 11 East, 571, the plaintiff brought an action on the case against the defendant for willfully making loud noises, by discharging guns, whereby he was disturbed in the exercise of his right in taking wild ducks, by his decoys being frightened away. The court held that, although the plaintiff was engaged in taking wild fowl upon a public stream, yet, that, as he had a right to hunt there, the defendant had no right *willfully* to disturb him in the exercise of this right, and the plaintiff had a verdict for £2 damages, which was sustained on appeal.

In *Keeble v. Heckeringill*, 11 East, 547, a similar action was brought, except that in this instance the plaintiff was disturbed in the taking of wild fowl in a decoy pond upon his own premises, and the noises made by the defendant were also made upon his own premises, but with the view and purpose of frightening away the ducks from the plaintiff's pond. Lord Holt, C. J., in noting the distinction between a disturbance arising from malicious and lawful acts, said, "Suppose the defendant had shot in his own ground; if he had *occasion* to shoot, it would have been one thing; but to shoot on purpose to damage the plaintiff, is another thing, and a wrong." Thus it will be seen that an *accidental* noise, or one that arises from the lawful exercise of a right, may not be an actionable nuisance, even though specially injurious to others, but, if it is made with the view and purpose of creating a special injury, it will be actionable, although it only becomes so by the presence of improper motives.

SEC. 550. A trade cannot be carried on in a locality where, by reason of the noise incident to the business, it produces damage to others, and the diminution of the comfortable enjoyment of life or property is regarded as a sufficient damage to uphold an action.

In *Fish v. Dodge*, 4 Denio (N. Y.), 311, the plaintiff was the owner and occupant of a dwelling-house, on Beaver street, in the city of Albany, and the defendant was the owner of a lot with buildings thereon adjoining the plaintiff's lot. In May, 1845, the defendant rented the east end of his building to certain parties to be used for the finishing of steam boilers. The defendant occupied the west end of the building as a blacksmith shop, and there was no partition dividing the building. In the prosecution of the business, in the language of the case, "there was a tremendous noise and pounding, commencing at about 6 o'clock in the morning and continuing until sun-down. Immense quantities of dust arose from the work in the shop, which penetrated the plaintiff's house, settled upon the curtains and furniture and filled the air of the house, making it difficult to breathe. It prevented the plaintiff from opening her windows and deprived her of the use of her yard for drying clothes." The court charged the jury that, although the business of the defendant was lawful, and in no wise a nuisance, that it might become so, either by the manner of conducting it, or by locating it in the immediate vicinity of a dwelling-house, whether in the heart of a city or elsewhere, and that what was done in this case to the annoyance of the plaintiff, was a nuisance. The plaintiff had a verdict for \$150 and costs; and upon appeal, the ruling of the court upon this point was sustained, but the judgment was reversed because the recovery was in excess of the *ad damnum* laid in the writ.

SEC. 551. In *Bradley v. Gill*, Lutwyth, 69, the defendant converted a dwelling-house, adjoining the plaintiff's house, into a smith's forge, and the noise from hammering upon the anvils was a serious annoyance to the plaintiff's family, and was held a nuisance.

SEC. 552. The fact that the business cannot be conducted with-

out creating great noise, and that it is a useful and lawful business, is no defense, but is rather a circumstance tending to establish it a *prima facie* nuisance.

In *Elliotson v. Feetham*, 2 Bing. (N. C.) 134, the defendants erected a manufactory for the working of iron and steel, near the dwelling-house of the plaintiff, and in the prosecution of their business caused loud, heavy, jarring, varying or agitating hammering or battering sounds or noises, so that the comfortable enjoyment of the plaintiff's property, and even the property itself was greatly impaired. The defendants insisted that they could not be charged with the damages resulting from their works to the plaintiff, because their works were erected ten years before the plaintiff's dwelling was erected, and that their trade was a lawful one and could not be conducted without producing the results named. But the court held that they were liable, and that the fact that their business was established before the plaintiff came to the neighborhood, and that the trade was lawful and the ill-results necessarily incident thereto, was no defense.

SEC. 553. In *Scott v. Firth*, 10 L. T. (N. S.) 241, the defendant erected a rolling-mill, with heavy hammers used also for hammering iron, near the plaintiff's dwelling-house, and the noise arising from the business in the process of rolling and hammering iron was annoying and productive of great discomfort to the plaintiff and his family. It also appeared that the business was productive of vibratory and jarring motions, which shook the plaintiff's building and cracked the walls. The court held that this was a nuisance, and that the fact that the trade was a lawful and useful one, did not justify its prosecution in a locality where it was productive of injury and damage to others. That, for injuries resulting unavoidably from the ordinary use of property, no nuisance could be charged; but that a rolling mill, or a trade productive of excessive noise or vibration, is not an ordinary use.

SEC. 554. In *Gullick v. Tremlett*, 20 Weekly Rep. 318, the plaintiff was an artist, following his business upon the upper floor of No. 39 Old Bond street, in London, and of the first and

second floors of No. 39½. He had converted the building No. 39½ into a picture gallery, and this gallery was situated in the rear of No. 39. The defendant was a veterinary surgeon, following his business upon the first floor of No. 39, and, among other appliances, had there an anvil used for hammering iron in shoeing horses, etc. The plaintiff alleged, among other grounds of complaint, that the vibration and jarring, induced by the hammering of iron upon the anvil, had shaken the walls and ceiling of his picture gallery and destroyed his colors. The defendant was enjoined from following his trade there in such a way as to create a nuisance to the plaintiff, either by noise or vibration or the production of noxious smells or gases.

SEC. 555. In *Robertson v. Campbell*, 13 F. C. (Sc.) 61, the defendant was a printer, in Edinburgh, and had his printing office, in which was a heavy printing press in the vicinity of the plaintiff's dwelling. In the prosecution of his business, the noise of his press was annoying to the plaintiff's family, and the press, when in use, produced vibratory and jarring sounds and motions which shook and injured the building. The court held that the business in that locality, producing those results, was a nuisance.

SEC. 556. In *Johnson v. Constable*, 3 D. (Sc.) 1263, the defendant was the owner of a building, the second floor of which he rented to the plaintiff. The defendant put a steam-engine into the lower part of the building to furnish the motive power for the running of a printing-press. The noise, vibration and jarring produced thereby proved a serious annoyance to the plaintiff, and an interdict was granted restraining the use of the steam-engine for that purpose until an examination could be made under judicial inspection, to ascertain whether there was any mode by which it could be used without injury.

SEC. 557. In *Cooper v. North British R. R. Co.*, 35 Jur. 295; 1 Macph. 499, the defendant, a railroad corporation, had been duly authorized to erect buildings, machinery and apparatus necessary for the purposes of its building, and in pursuance of its

own convenience, and claiming the legal right under its general powers, it erected works for hardening rails to be used in the construction, maintenance and repair of its road, in the vicinity of the plaintiff's premises. The noise produced thereby was annoying to the plaintiff and seriously impaired the comfortable enjoyment of his property. The court held that the works were a nuisance, and that the fact that the legislature had authorized the construction of such works by them, did not justify them in erecting them in a locality where they would prove a nuisance.

SEC. 558. In *Kinloch v. Robertson*, Keames' Select Decisions, 175, the defendant was a tenant in the occupancy of the upper floor of an urban tenement, and the plaintiff occupied the lower floor of the same building. The defendant erected a forge in his part of the tenement, and the noise and vibration produced by the blows struck on the anvil, proved seriously annoying and injurious to the plaintiff. The court held that the business there conducted was a nuisance and that the pursuit of any trade or business in a dwelling or place adjoining, to the annoyance and discomfort of others, is actionable.

SEC. 559. In *Eaden v. Firth*, 1 Macph. (Sc.) 573, the defendant was a manufacturer of steel at *Sheffield*, and having placed in their manufactory an enormous hammer, operated by steam, which disturbed the enjoyment of the plaintiff's dwelling adjoining the works, by disturbing their rest at night by the noise and rocking produced in working the hammer, and depriving them of sleep, the plaintiff brought his bill for an injunction, and the court, holding that the works so located and producing such results were a nuisance, ordered an issue to be made to determine whether the injury could be avoided.

SEC. 560. In *Roskell v. Whitworth*, 19 W. R. 804, the defendants were the proprietors of an iron manufactory in a populous part of Manchester, and had a heavy steam hammer therein. Adjoining their works was a Catholic church, over which the plaintiff presided, and a dwelling-house in which he lived, and a school connected with the church, having about 400 pupils. The

noise of the steam hammer disturbed the worship at the church, interfered seriously with the comfortable enjoyment of the dwelling by its noise and vibratory sounds, and also interfered seriously with the operations of the school. Held a nuisance.

SEC. 561. In *Brand v. Hammersmith R. R. Co.*, 2 Q. B. 223, the defendants, under powers conferred by the legislature, constructed a railroad near the plaintiff's house, but over no part of his premises, and for which no compensation had been paid, and rented it to another railroad company. It was alleged, that in the running of trains over the defendant's road it always had and always would occasion vibration, noise and smoke, and that in consequence thereof, a permanent injury was done to the premises, and that the value of the premises had been greatly depreciated thereby, and would never be as valuable as before, so long as the railroad was operated in its present location. BRAMWELL, B., in delivering the judgment of the court, said: "It is said that the railway and the working of it are for the benefit of the public and that therefore the damage must be done and be *uncompensated*. Admitting that damage must be done for the public benefit, that is no reason why no compensation should be given. * * * Either the railroad ought not to be made or the damage ought to be compensated for." Yet, while the court held that the operation of the road producing those results was a nuisance, they felt compelled to hold that the plaintiff could not recover in an action on the case, as the damage must be treated as not being within the statute. CHANNEL, B., however, felt constrained to dissent from the views of a majority of the court, and delivered an able opinion, in which he maintained the right of the plaintiff to a recovery.

SEC. 562. The noise of musical instruments kept up for such periods of time, and at such hours of the day or night as to be really annoying to persons of ordinary sensibilities, or that produce other actual ill-results, is a nuisance, and *any* noise whether of musical instruments, the human voice, discharge of guns, or however produced, that draws together in the vicinity of a person's residence or place of business, large crowds of noisy and dis-

orderly people, is a nuisance,¹ and it is held that the unreasonable performances of bands of music and the discharge of fireworks in the vicinity of populous towns, will naturally produce that result, and are therefore regarded as *prima facie* nuisances.²

SEC. 563. In *Inchbald v. Barrington*, 4 L. R. Ch. App. 383, the question as to whether the noise of music in the vicinity of a dwelling kept up at regular intervals for several hours each day for several successive days, and often until 11 o'clock at night, is a nuisance.

In that case the defendant had erected a circus on *Fair Field*, situated in front of *Park Terrace*, at a distance of about 115 yards from the plaintiff's house, with a view of keeping it in operation for the period of eight weeks. On the 18th of September, 1867, the circus was erected and the performance commenced at about half-past seven o'clock in the evening. On the 23d of the same month, the plaintiff filed his bill for an injunction, alleging that on the 18th of September, the performance commenced at half-past seven o'clock in the evening and lasted until about eleven o'clock, and that a great number of people attended the performance. That throughout the performance there was music, including a trombone and other wind instruments, and a violoncello, and great noise with shouting and cracking of whips. That the noise occasioned very great disturbance to the plaintiff and his family and to other occupiers of houses in *Park Terrace*, and that the performance attracted vendors of walnuts, and other noisy persons, in great numbers, who loitered about the terrace in great numbers all day. The bill also alleged a repetition of the performance the two succeeding days, and that by reason of the noise and crowds, the performance was an intolerable nuisance to himself and family, and if continued, would greatly diminish the value of the plaintiff's dwelling as a residence; an injunction was granted, and on appeal the injunction was sustained upon the ground that the noise of the music and of the crowd as set forth in the bill and proved, was a nuisance.

¹ Lord CRANWORTH in Attorney-General v. Sheffield Gas Co., 19 E. L. & Eq. 639; *Inchbald v. Barrington*, 4 L.

R. Ch. App. 488; *Walker v. Brewster*, 5 L. R. Eq. Ca. 31.

² *Walker v. Brewster*, 5 L. R. Eq. Ca. 31; *Inchbald v. Barrington*, ante

Sir G. M. GIFFORD, L. J., in disposing of this branch of the case, said: "It is clear from the evidence before us that the music and noises in the circus were distinctly heard all over the plaintiff's house for several hours every night. This was something materially interfering with the comfort of the inhabitants according to the ordinary habits of life, and I am of opinion that the injunction was rightly granted."

SEC. 564. In *Walker v. Brewster*, 5 L. R. (Eq. Cas.) 25, a similar question to that in *Inchbald v. Barrington* arose, upon an application to restrain the defendant, who was the lessee of *Molineaux House* and grounds at *Wolverhampton*, from holding *fetes* upon those grounds for displays of fireworks, or for public music or dancing, or for any other public entertainment whereby large numbers of idle persons might be drawn to the neighborhood.

The plaintiff was the owner of premises adjoining those occupied by the defendant, and only separated by a narrow footway, which he occupied for a residence. The defendant was the proprietor of a music hall in *Wolverhampton*, and on the 10th of June, previous to the bringing of the plaintiff's bill, he had held a monster *fete* on the grounds, and this was followed by *fetes* every Monday and Friday evening, with music, dancing and fireworks (except that on Fridays, no fireworks were discharged). The *fetes* brought together great crowds of idle and dissolute persons, to the great annoyance of the plaintiff and his family, and the bands of music played from nine to ten hours on each occasion without cessation, and the noise from the fireworks were frequent and very annoying and often frightened the plaintiff's horses, so that they broke loose from their fastenings, and the noise of the crowd was loud and continuous. The plaintiff alleged that if the *fetes* were allowed to continue, the value of his residence would be depreciated, as a gentleman's residence, from £1,000 to £2,000.

Sir W. PAGE WOOD, V. C., in disposing of the question of nuisance, said: "It seems to me that a clear case of nuisance has been made out in the collection of the crowd alone. Having regard to the fact that this court has restrained the ringing of

bells,¹ I confess I have a strong opinion that a powerful brass band, which plays twice a week for several hours in the immediate vicinity of a gentleman's residence, is a nuisance which this court would restrain. I still have a clearer opinion that the noise of fireworks, as contrasted with the ringing of bells, to say nothing of the damage that may be occasioned by the falling rocket sticks, is a serious nuisance. But that the collection of crowds is a nuisance has been fully established; and, in the neighborhood of a populous town, the letting off of fireworks and the performance of powerful bands, will collect together crowds as a *necessary* and not a *merely probable* consequence."

SEC. 565. A person has no right to devote his residence, or any part of it, to an unusual use, when such unusual use is, or will be productive of injury or damage to his neighbor, in the enjoyment of his dwelling, or place of business.² Thus a man may not convert a part of his house into a smith's forge, and thus, by the noise or vibration arising from striking on the anvil, or the smoke or offensive odors arising from the exercise of the trade, impair the comfortable enjoyment of another's premises;³ neither may he establish a printing press therein, the noise and vibration from which is productive of serious annoyance to the owner of adjoining property,⁴ nor exercise any noisy or offensive trade therein, unless he can confine all the ill-effects to his own premises.⁴

SEC. 566. In *Ball v. Ray*, *ante*, the defendant was the occupant of a house No. 19 Grosvenor square, London, the basement of which had, for more than fifty years, been used as a stable and sometimes as a coach-house. The defendant went into possession in 1871, and made some changes and alterations in the stable which greatly increased the noise arising from the stable and increased the number of horses kept therein. There had previously never been more than one horse kept in the stable.

¹ *Soltan v. De Held*, 2 Sim. (N. S.) 133.

² *Ball v. Ray*, 8 L. R. (Ch. App.) 467; *Dawson v. Moore*, 8 C. & P. 48; *Dennis v. Eckhardt*, 3 Grant (Penn.), 390.

³ *Gullick v. Tremlett*, 20 Weekly Rep. 358; *Kinloch v. Robertson*,

Keames' Sel. Decisions, 175; *Bradley v. Gill*, Lutwyth, 69.

⁴ *Roberts v. Campbell*, 13 F. C. (Sc.) 61; *Johnson v. Constable*, 3 D. (Sc.) 1263; *Duke of Northumberland v. Clowes*, C. P. at Westminster cited by *Chitty*.

The plaintiff was the occupant of house No. 18, which he had rented for a term of sixteen years, at a rental of £130, and had fitted up as a private hotel. The nuisance alleged by the plaintiff was, that on the ground floor of the street front of the defendant's house on *Green street*, which was next door to the plaintiff's house, the defendant had constructed, or re-constructed, a stable with iron mangers fastened against the party wall which divides that house from the best living rooms of the plaintiff's house; the horses' heads being turned in their stalls toward that party wall, and the chains by which they were held in their stalls, being iron chains, fixed either to the wall or to the iron mangers attached to the wall, and, in other respects, it appeared that a new state of things had been created in the stable by the defendant. The plaintiff in consequence of the noise made by the horses in the stable by the rattling of the chains and stamping upon the floor was seriously annoyed in the enjoyment of his hotel, and many of his boarders left in consequence.

Sir G. MELLISH, L. J., in commenting upon this branch of the case, said: "In my opinion, and indeed it is hardly seriously denied by the defendant's counsel, the defendant has committed an actionable nuisance. I entirely agree with what has been said by the lord chancellor, that when in a street like *Green street*, the ground floor of a neighboring house is turned into a stable, we are not to consider the noise of horses from that stable like the noise of a piano forte from a neighbor's house, or the noise of a neighbor's children in their nursery, which are noises we must necessarily expect and, to a certain extent, must put up with. A noise of this kind, if it materially disturbs the comfort of the plaintiff's dwelling-house and prevents people from sleeping at night, and still more, if it does really and seriously interfere with the plaintiff's trade as a lodging-house keeper, it, beyond all question, constitutes an actionable nuisance."

Lord SELBORNE, L. C., said: "With regard to the question of law in this case, I shall say very little, because these questions are eminently questions of fact, rather than law; but I desire to say as much as this; in making out a case of nuisance of this character, there are always two things to be considered; the right of the

¹ *Dargan v. Waddell*, 9 Ired. (N. C.) 244; *Burdett v. Swenson*, 17 Tex. 489.

plaintiff and the right of the defendant. If the houses adjoining each other are so built that from the commencement of their existence it is manifest that each adjoining inhabitant intended to enjoy his own property for the ordinary purposes for which it and all the different parts of it were constructed, so long as the house is so used, there is nothing that can be regarded in law as a nuisance which the other party has a right to prevent. But on the other hand, if either party turns his house or any portion of it to *unusual purposes* in such a manner as to produce substantial injury to his neighbor, it appears to me that that is not according to principle or authority, a reasonable use of his own property, and his neighbor, showing substantial injury, is entitled to protection. I do not regard it as a usual or as a reasonable manner of using the front portion of a dwelling-house in such a street as *Green street* that it should be turned into stables for horses, and if it is so used, then the proprietor is bound to take care that it is so used as not to be a substantial annoyance detrimental to the comfort and the value of the neighbor's property."

SEC. 567. In *Dawson v. Moore*, 8 Carr. & Payne, 25, the plaintiff brought an action on the case against the defendant for a nuisance arising from a noise of *hammering* in the adjoining house. As to whether the defendant was exercising a trade there, or how long the hammering continued, the case is silent, as well also as to the special injury produced; the only question in the case being as to whether proof of the fact that the defendant was the occupant of the house was sufficient to charge him with the nuisance. However, the plaintiff had a verdict, and it is reasonable to presume that the hammering arose from a use of the house in an *unusual* manner, and that the noise was productive of damage.

SEC. 568. In determining the question of nuisance from noise or vibration reference is always to be had to the locality,¹ the nature of the trade or use of property producing it,² the time during which it exists,³ the intensity of the noise,⁴ and the effects

¹ *Cleaveland v. Citizens' Gas-light Co.*, 20 N. J. 201.

² *Dennis v. Eckhardt*, 3 Grant's Cas. (Penn.), 390.

³ *Inchbald v. Barrington*, 4 L. R. (Ch. App. 388; *Ross v. Butler*, 19 N. J. 294.

⁴ *Dennis v. Eckhardt*, 3 Grant (Penn.), 390.

produced thereby.¹ No definite rule can be given that is applicable to every given case, as each case must necessarily stand by itself, and be determined by a jury with reference to the circumstances peculiar to itself.² Where the injury is to the comfortable enjoyment of property, it must be shown to be so extensive as to produce actual pecuniary loss,³ or as to produce such a condition of things as in the judgment of the jury would be productive of actual physical discomfort to persons of ordinary sensibilities, and of ordinary tastes and habits, and, as, in view of the circumstances of the case, is unreasonable and in derogation of the plaintiff's rights.⁴

SEC. 569. While on the one hand the presence of other nuisances will not excuse this one,⁵ yet, in determining this question, the locality is always to be considered, as well as the occupancy of the property upon which it is claimed that the injury is inflicted.⁶ If the nuisance exists in a locality that is built up with elegant residences, and that is well adapted for that purpose, it is a circumstance to be taken into account, for there is less excuse for a man to set up a trade that *may* become productive of ill-results to others in such a locality, than in one that is less eligible as a place for dwellings, or that has already been in part given up to trades of different kinds.⁷

SEC. 570. The fact that a trade, whether a *noisy* trade or one that liberates smoke, noxious vapors or noisome smells, or any use of property, however improper on the part of the person devoting his property to such use, impairs the value of adjoining property, does not thereby create a nuisance, unless the ill-results from the trade produce actual physical discomfort or a tangible, visible injury to the property itself. Mere diminution of the value of the property, in consequence of the use to which adjoining premises are devoted, unaccompanied with other ill-results,

¹ Davidson v. Isham, 11 N. J. 186.

Lunatic Asylum, 4 L. R. Ch. App. 279.

² Dennis v. Eckhardt, 3 Grant's Cas. (Penn.) 390.

McKeon v. See, 51 N. Y. 574.

³ Ball v. Ray, 8 L. R. Ch. App. 467.

⁶ Doellner v. Tynan, 36 How. Pr. (N. Y.) 124; Showerman v. Gilbert, 24 Mich. 443.

⁴ Duncan v. Hayes, 22 N. J. 26.

⁵ Attorney-General v. Colney Hatch

⁷ Ross v. Butler, 19 N. J. 294.

is "*damnum absque injuria*." ¹ But where the use of adjoining property produces actual physical discomfort, or materially impairs its value as a residence or place of business, or produces a tangible, visible injury to the property itself, the use is a nuisance, and the diminution in the value of the premises affected by the nuisance, is an important element of damage.²

SEC. 571. In *Harrison v. Good*, 11 L. R. (Eq. Cas.) 338, the plaintiffs and defendant were in possession of parcels of an estate formerly belonging to one person. The defendant's grantee, upon receiving the conveyance of his parcel, covenanted not to devote the premises to any purpose which should be a nuisance to the adjoining parcel. The defendants were about to erect a school building upon the premises, when the plaintiffs brought their bill for an injunction, upon the ground that the school would be a nuisance to their premises by calling together a large crowd of children, who would make a great noise and disturbance and dirt, and conducting themselves indecently and offensively, to the serious annoyance and disturbance of the plaintiff, and would greatly depreciate the value of their property.

The defendants adopted a number of rules for the conduct and management of the schools; among which was one that the schools were under the superintendence and management of the clergy and a committee of gentlemen in the neighborhood. Another, that the children were to be in the school every morning at 9 A. M., with clean hands and face, their hair neat, etc. The boys' school was to close at 12 M. and the girls' at 12.15 P. M. Both schools to open in the afternoon at 2 P. M. and to close, the girls' at 4.15 P. M. and the boys' at 4.30 P. M. There was also another rule, which provided that every effort was to be made, and precaution taken, to insure quiet and orderly entrance into, and departure from, the school premises. The scholars, on leaving, were to be sent in order out of *Abbey Place*, under the charge of the pupil teachers; and children who are guilty of noisy or refractory behavior in coming to or returning from the

¹ *Harrison v. Good*, 11 L. R. (Eq. 11 H. L. Cas. 648; *Salvin v. North* Cas.) 338; *Ross v. Butler*, 19 N. J. Brancepeth Coal Co., 31 L. T. (N. S.) 294. 151; *Gauantlett v. Whitworth*, 2 C. &

² *Tipping v. St. Helen Smelting Co.*, K. 720.

school were to be immediately punished, and on a repetition of the offense, were liable to expulsion from the school.

The plaintiff produced evidence to show that property in the neighborhood of such schools was thereby depreciated in value.

Sir JAMES BACON, V. C., in denying the application for an injunction, thus comments upon the idea that mere diminution of the value of property, by the use of adjoining property, will create a nuisance. "I have no doubt that the value of this property will be depreciated. But the case referred to is by no means an authority for the proposition that, because a depreciation in value would take place, the owners of adjoining property suffering depreciation have therefore a right to call that a nuisance, which they fail to prove otherwise to be a nuisance. The law upon that subject I take to be clear and plain. I am obliged, therefore, to come to the conclusion that no legal nuisance will be committed; and I will go a little farther and say I do not believe there could by possibility happen, any thing which can properly be called a nuisance, although it may be an inconvenience or a disadvantage."

SEC. 572. In *McKeon v. See*, 4 Robt. (N.Y. S. C.) 449, affirmed, Ct. of App., 51 N.Y. 300, the defendant was the owner of premises on Bleecker street, in New York city, adjoining premises of the plaintiff upon which were two dwelling-houses. The defendant occupied the building upon his premises as a marble mill for the sawing of marble, and the motion of the machinery *jarred* and *shook* the plaintiff's buildings to such an extent as to injure them materially. The court held that this constituted a nuisance, that entitled the plaintiff to an injunction to restrain the defendant from the use of his building for the purpose of sawing of marble. And it was also held that the fact that the business had been carried on there for nine years without objection on her part, did not operate to deprive her of the remedy by injunction. In cases of this character, the *gist* of the action is injury and damage. When those exist as the natural and probable result of a use of property by others, such use creates an actionable nuisance.*

* *Gauntlett v. Whitworth*, 2 C. & K. 720.

* *Farmers of Hempstead*, 12 Mod. 519.

But where there is damage without injury to the comfortable enjoyment of property, or a visible, tangible injury to property itself, no nuisance exists.¹

The *motive* with which an act is done, if the act is strictly legal, cannot have the effect to make that a nuisance, which would not be so, in the absence of malice or bad motive.² There are cases in which a different doctrine is held, but the general tendency of the courts is now toward the more sensible rule, that so long as a man confines himself in the use of his property within the scope of his legal rights, no action lies against him for injuries arising therefrom, whatever may have been the *motive* with which the act was done.³

SEC. 573. In a case heard before the Washington General Term in New York, in May, 1848, and reported in the 6th of Barbour's Reports, 313, *The Trustees of the First Baptist Church in the City of Schenectady v. The Utica and Schenectady R. R. Co.*, the plaintiffs brought an action, as trustees of the church and society, against the defendant, for injury sustained by the society, by reason of being disturbed in devotional exercises on the Sabbath, by the running of the engines and cars of the defendant over their railroad in the vicinity of the church, the noise of which, by the running of the cars, blowing of the whistle, ringing of the bell, and letting off of steam, it was claimed seriously impaired the value of their property for church purposes. The court held that the action could not be maintained. That, while it is true that *noise* may create a nuisance, yet, that it must be a very special case in which real estate could be injured by a *mere* noise, and that, if an action could be upheld, it could not be upheld in behalf of the plaintiffs, as the injury, if any, was sustained by the attendants upon worship there, and not by the society because of the deterioration in the value of their property for church purposes. It is proper to say that the doctrine of this case was directly overruled at the Rensselaer General Term, in November, 1848, in an action in favor of the

¹ *Ross v. Butler*, 19 N. J. 294.

² *Chatfield v. Wilson*, 28 Vt. 49; *Harwood v. Benton*, 32 id. 724; *Mahan v. Brown*, 18 Wend. (N. Y.) 148; *Pickard v. Collins*, 23 Barb. (N. Y. S. C.) 444;

People v. Albany & Susquehanna R. Co., 57 id. 204.

³ See *State v. Linkinshaw*, 69 N. C. 214; 12 Am. Rep. 545.

same plaintiff against the Schenectady and Troy R. R. Co., and reported in the 5th of Barbour, 79. The chronological order of reporting cases, would legitimately place the first case referred to in the 5th of Barbour instead of the 6th, but through inadvertence on the part of the reporter, the case first decided is made apparently to overrule the one last decided. In the latter case, the court upheld the action, upon the ground that the deterioration of the value of property, by a nuisance which affects property in any of the ways recognized as coming within the idea of a nuisance, is the proper subject of an action, and in this position there is no question but that the court are abundantly sustained by authority. The statement of HAND, J., that that must be a very special case in which real estate can be injuriously affected by a *mere* noise, is far from being sustained, either by experience or authority. The learned judge did not intend probably to be understood as holding that the deterioration in the value of real property by a nuisance created by noise, is not as much the subject of an action as a deterioration in its value by any other species of nuisance, but that, in the case in hand, the nuisance and damage had not been established. No person can doubt that if, by reason of the *noise* arising from an unlawful use of the defendant's road, the plaintiff's church was rendered less valuable for church purposes, that an action would lie therefor, as well as it would for a similar injury to a dwelling-house, or place of business. The fact that the property might be more valuable by reason of the existence of the nuisance, for some other purpose, is of no account, as the owners of real estate have a right to consult their own tastes and interests in its use, without reference to the tastes or interests of others, so long as no ill results within the idea of a nuisance ensue to others therefrom.¹

SEC. 574. No action can be maintained by persons in attendance upon divine service, against one who interferes with his enjoyment thereof by reason of noise or otherwise, as such interference produces no injury or damage, except such as is common to all, therefore if it is a nuisance it is a *public nuisance*, and

¹ Barnes v. Hathorn, 54 Me. 247; Wesson v. Washburne Iron Co., 13 Roberts v. Clarke, 17 L. T. (N. S.) 384; Allen (Mass.), 95. Francis v. Schoellkopf, 53 N. Y. 154;

punishable only by indictment. The individuals who are disturbed in their religious meditations have no such interest in the building that they can be said to be specially injured in their property, or in any respect in any other or different manner than all others are injured who are thus disturbed, and, therefore, cannot maintain a private action therefor.¹

CHAPTER SEVENTEENTH.

NAVIGABLE STREAMS.

SEC. 575. The ebb and flow of the tide the common law test of navigability,

576. All streams *publici juris* capable of use as highways.

577. Streams navigable in law, and those navigable in fact.

578. Distinction as to riparian rights.

579. Enlargement of the common-law rule in this country.

580. The test of navigability in most States.

581. Floatable streams.

582. Rights of riparian owners on fresh-water streams.

583. Legislature cannot declare stream navigable, without compensation in certain cases.

584. No distinction made in some of the States between tidal and fresh-water streams.

585. Riparian owner restricted to low-water mark in certain States.

586. Three classes of navigable streams defined.

587. Navigability of fresh-water streams, dependent upon their capacity, and a question of fact.

¹ In *Owens v. Henman*, 1 W. & S. (Penn.) 548; Trustees, etc., v. R. R. Co., 5 Barb. (N. Y.) 313; Comyn's Digest, 180, the ownership of a pew in a church makes nothing in support of the action. *Mainwaring v. Giles*, 5 B. & Ald. 356; *Griffith v. Matthews*, 5 T. R. 296; *Stocks v. Booth*, 1 id. 428.

In *Williams' Case*, 5 Coke, 73, which was an action against a person bound to celebrate divine service in a particular church, for refusing to do so, it was held that the action would not lie, as, in order to maintain an action for a nuisance, the party bringing the action must have sustained some special or particular damage, not common to all. *Jones v. Stone*, 1 Ld. Raym. 579; *Clonell v. Cardinal*, 1

Siderfin, 34; *Corven's Case*, 13 Coke, 105; *Langley v. Chute*, T. Rayd. 246;

In *Sparhawk v. Union*, etc., R. R. Co., Phila. Leg. Int. (Penn.), Nov. 22, 1867; 54 Penn. St. 401, *Thompson, J.*, in passing upon the right of a person to maintain an action for an injury arising from a disturbance of religious devotions in a church upon a Sabbath, by noise, etc., says: "The plaintiff claims no right in the church which has been invaded. There is no damage to his property, health, reputation or person. He is disturbed in listening to a sermon by noises. The injury is not of a temporal, but of a spiritual nature, for which no action lies." See *State v. Linkinshaw*, 69 N. C. 214; 12 Am. Rep. 645.

SEC. 588. Right of floatage dependent upon *valuable* use.

589. Riparian owners may apply water to mechanical uses, subject to public easement.

590. Rule in *Rhodes v. Otis*.

591. Non-tidal streams susceptible of use for commercial purposes.

592. Right of State to cut off access to the stream.

593. Right restricted to streams where riparian owners are restricted to high-water mark.

594. Interfering with one's convenience not always actionable.

595. When consequential damages may be recovered.

596. Power of State over its natural streams.

597. Control over tidal and inter-State streams.

598. State occupies to such streams the relation of riparian owner.

599. Decisions of United States courts relative to obstructions erected by State authority, not applicable to unauthorized obstructions.

600. What erections, etc., State may authorize.

601. State may convey its title to the shore.

602. Any unauthorized obstruction a nuisance.

603. Rule in *Rex v. Grosvenor*.

604. Distinction between purprestures and nuisances.

605. Vessel obstructing navigation, when a nuisance.

606. Floating docks, storehouses, etc.

607. Obstructions over, under, or in a navigable stream.

608. Driving piles in, abstraction of water from, erection of dams, etc.

609. Rule in *Collins v. Philadelphia*, relative to diversion of water.

610. Pollution of water of navigable stream.

611. Discharging refuse into.

612. Riparian owner may erect wharf on tidal stream on his own land.

613. Not necessary that navigation should be actually obstructed to create a nuisance.

614. Right of riparian owner who owns *ad medium filium aquæ*.

615. Owner is vested with natural franchise.

616. Doctrine of *Delaware and Hudson Canal Co. v. Lawrence*.

617. Question of nuisance *questio facti*.

SEC. 575. By the common law, all those streams in which the tide ebbs and flows are navigable, to the uttermost limit of the flow and reflow of the tide,¹ and all others are unnavigable,

¹ *Hale's De Jure Maris*, Part 1, Ch. 2; *Rex v. Smith*, 2 Doug. 441; *Atty.-Gen. v. Wood*, 108 Mass. 436; 11 Am. Rep. 380; *Peyroux v. Howard*, 7 Pet. (U. S. S. C.) 324; *Bail v. Herbert*, 3 T. R. 253; *Lapish v. Bangor Bank*, 8 Greenl. (Me.) 85; *Comyn's Dig. Navigation B*; *Carter v. Murcott*, 4 Bur. 2162; *Spring v. Russell*, 7 Me. 273; *Royal Fishery in the River Banne*, Davy's Rep. 149; *Blundell v. Catteral*, 5 B. & A. 256; *Attorney-General v. Earl of Lonsdale*, 7 L. R. Eq. Ca. 388; *Bickett v. Morris*, L.R. 1 Sc. Appeal, 47; *Williams v. Wilcox*, 8 Ad. & El. 314; *Attorney-General v. Johnson*, 2 Wils. 87; *Brown v. Chadborn*, 31 Me. 9; *Regina v. Betts*, 16 Q. B. 1022; *Stout*

unless they have become so by prescription' or act of parliament."

SEC. 576. But, while the common law only regarded those streams in which the tide ebbed and flowed to the extent of such flow and reflow as navigable, yet, there was another class of streams called fresh-water streams, which, if susceptible of navigation by "boats and lighters," or, as it would seem, for any beneficial public purpose, and were navigable *in fact*, were regarded as *highways* over which the public had free access, for the purposes of trade and commerce. The only *real* distinction between the two classes of streams arose from the distinction as to the ownership of the *alveus* of the stream, and the rights of riparian owners therein. In all salt-water streams, subjected to the action of the tides, the king not only owned the *alveus*, but had exclusive title in, and jurisdiction over the streams for all purposes not inconsistent with navigation, while in fresh-water streams, the

v. Millbridge Co., 45 Me. 76; *Morgan v. King*, 35 N. Y. 454; *Ex parte Jennings*, 6 Cow. 518, and *Hale's De Jure Maris* published therein; *Lansing v. Smith*, 4 Wend. (N. Y.) 9; *Constable's Case*, 5 Coke, 106; *Rex v. Russell*, 6 B. & C. 566; *Berry v. Carl*, 3 Me. 369; *Com. v. Chapin*, 5 Pick. (Mass.) 199; *Knox v. Chaloner*, 42 Me. 150; *Palmer v. Mulligan*, 3 Caines (N. Y.), 307; *KENT, J.*; *Ward v. Creswell*, 2 Wills, 265; *Scott v. Wilson*, 3 N. H. 321. There are cases in which it is said that the flow and reflow of the tide, is only *prima facie* evidence of public navigability. In *The Mayor of Lynn v. Turner*, Camp. 86, the court say that the flow and reflow of the tide does not necessarily constitute the test of its navigability. In *Blundell v. Catterall*, 4 B. & C. 603, *BEST, J.*, also denied that the fact that the tide ebbed and flowed in a stream, established it as a public navigable river. He said "The strength of the *prima facie* evidence arising from the flux and reflux of the tide, must depend upon the situation and nature of the channel." But this is predicated upon the theory, that the public rights originally attaching to the stream, have been lost by non-user by the public, and adverse user by the riparian owner, rather than from an idea that navigability *in fact* in a tidal

stream is in the first instance, in any measure the real test. Indeed this is evident from the language of *GIBBS, L. C. J.*, in *Miles v. Rose*, 5 Taunton, 705, as well as from the language of the court in *Home v. McKenzie*, 6 Cl. & Fin. 628. In the last-named case, the question arose as to whether the defendant had used his stake nets for the taking of salmon illegally. The real question was, whether the nets had been set in navigable waters of the sea, and the court having instructed the jury that the prevalence or absence of the fresh water was the point to be looked at, the instructions were held to be erroneous. It was held that the real question was, whether the place where the nets were set was in fact a part of the sea, and that the fact that the water was salt, did not render it less a part of the river. *Gunter v. Geary*, 1 Cal. 462.

¹ *HOLT, C. J.*, in *Warren v. Prideaux*, 1 Mod. 105; *Woolrych on Waters*, pp. 41, 42.

² *WILSON, Sergt.*, in *Ball v. Herbert*, 3 T. R. 254, in which he stated that except the Thames and Severn, few of the rivers of England, had become navigable for the public, except by express acts of parliament. See excellent article on "Riparian Rights," vol. 7 page 707 (O. S.), *Am. Law Reg.*

riparian owner had certain special privileges of which the king could not deprive him. He had the exclusive right of fishery,¹ the benefit of alluvial deposits or accretion,² the right to erect wharves which did not impede navigation and to take tolls for the use of them,³ and, in fact, a right to make any use of the water or the bed of the stream that his tastes or interests dictated, that did not interfere with the public right of passage.⁴ Therefore, when it is said that by the common law no stream is regarded as *navigable* except those in which the tide ebbs and flows, it is not meant that no other streams are burdened with a public easement of passage, but that *in law*, and irrespective of

¹ Carter v. Murcott, 4 Burr. 2163; De Jure Maris, 18; Mayor v. Richardson, 4 T. R. 437; Weld v. Hornby, 7 East, 195; Rogers v. Allen, 1 Camp. 307; Bract. B. 4, chap. 45, § 4; Schultes 45 to 85, also 101; Child v. Greenhill, Cro. Car. 554; Upton v. Dawkin, 3 Mod. 97; Coke's Litt. 122, n. 7; Chitty on Fisheries, 295; Alderman De Londres v. Hasting, 2 Sid. 8; Ashford v. Crispin, 1 Vent. 122; Gray's Case, Ow. 20; Reeve v. Digby, Cro. Car. 495; Hulford v. Pritchard, 3 Exch. 793; Vivian v. Blake, 11 East, 263; Rogers v. Allen, 1 Camp. 509; Seymour v. Courtenay, 5 Burr. 2816; Smith v. Kemp, 2 Salk. 637; Gibb v. Walliscott, 3 Salk. 291.

² Beaufort v. Swansea, 3 Exch. 433; Schultes, 122; Fleta, B. 3, chap. 2, § 2, where it is said that "this increase is so subtle as to make it impossible to determine when it was made, or where," and that "if the increase is such as that no one can perceive it as it advances by degrees after many years, and not in one day, nor even in a year, it belongs to him to whose soil it has attached itself; but if it happened suddenly, by the force of an inundation, so as to deprive the opposite lord, whose the water was not, of part of his soil—as, for instance, if part of the opposite shore were divided *impetuously* and *forced* upon the land of the other lordship, in this case the soil thus formed should not be divested out of its original proprietor."

In Attorney-General v. Richards, 2 Anstr. 614, McDONALD, C. B., said, "It is clear that the right to the soil between high and low-water mark is

prima facie in the crown. The *onus* of proving an adverse title is upon those setting it up." Toppesham's Case, 16 Vin. Abr. 574; Carlish v. Stepkins, 2 Keble, 759. The soil between high and low-water mark may be parcel of a manor where it has so been used time out of mind. Sir Henry Constable's Case, 5 Coke, 107; Digg's Case, Bracton, 9. As to the extent of the king's title it was held in corporation of Rumney's Case, 4 Bac. Abr. 153, that "the king shall have all lands left by, or acquired from the sea. If the sea marks are gone, so that it cannot be known if ever there was land there, the land gained from the sea belongs to the king. But if the sea cover the land at *flux* of the sea, and retreat at the *reflux*, so that the sea marks are *known*, if *such* land be gained from the sea, it belongs to the owner of the banks." See 3 Dyer, 326, n. a.

The king may convey his title, Schultes, 110, but the soil must have become convertible and derelict. 4 Bac. Abr. 154. Much confusion exists in the early cases, as to the rights of the king, and the rights of riparian owners, which is perhaps nowhere better illustrated than in Johnson v. Barrett, Alleyn, 10, where ROLLE and HALE differed upon the question of the ownership of a quay between high and low-water mark.

³ Rex v. Grosvenor, 2 Stark. 511. The question is whether the wharf is a *nuisance* to navigation, not whether it is a benefit thereto. Rex v. Randall 2 Car. & M. 496.

⁴ Juxon v. Thornhill, Cro. Car. 133.

the question of fact, all such streams are navigable, whether they are so in fact or not, and that the title thereto, with all privileges, vests in the king; and that all other streams, *navigable in fact*, are highways for the passage of boats, but the title to which, with all special privileges, outside of the public easement, vests in the owner of the banks.

SEC. 577. Lord HALE, in that most excellent treatise, which is generally conceded to be full authority upon the law of navigable streams, and which has been, and still is, quoted by all the courts of this country and England with approval, *De Jure Maris*, ch. 3, says: "There be some streams or rivers that are private, not only in propriety or ownership, but in use, as little streams and rivers that are not of common passage for the king's subjects. Again, there be other rivers, as well *fresh* as *salt*, that are of common or public use for the carriage of boats and lighters, and these, whether *fresh* or *salt*, whether they flow and reflow or not, are *prima facie*, *publici juris*, common highways for man or goods, or both, from one inland town to another." And, in support of his proposition, he instances the case of the *Wey*, the *Severn* and the *Thames* as rivers of that description.¹ Thus, it will be seen that, while at the common law those rivers were only regarded as *navigable* in which the tide ebbed and flowed, yet all other rivers navigable *in fact* were regarded as highways, and were open to use by the public for the ordinary purposes of navigation, without compensation to the owner of the banks. But, it is believed, that, while generally before such streams were regarded as *public*, they had become so by immemorial user, or by express act of parliament; yet, that this was not indispensable, but that, if such streams were *in fact* navigable, they were highways open to all the king's subjects, whether they had previously ever been so used or *not*, or whether they had been so declared by act of parliament. WOOLRYCH, who is regarded as good authority, and who certainly has exhibited great diligence and industry in endeavoring to get at the real legal *status* of such streams, and the relative rights of the public and of riparian owners therein, says: "A public navigable river *frequently* owes its

¹ Ball v. Herbert, 3 T. R. 254.

title to be considered such, from time immemorial, by reason of its having been an ancient stream; but very many acts of parliament have been passed to make those navigable, which were not so before.”¹ Thus, it will be seen that even in England, according to WOOLRYCH, by the common law, all streams which, in their natural state, were susceptible of valuable use for the purpose of navigation by “boats and lighters,”² were regarded as *publici juris*, and the mere fact that they were susceptible of such use was sufficient to justify their use as such, even though they had not, by prescription or statute, previously been elevated to such use. By *magna charta*, as well as by other statutes, it was provided that all persons should have liberty to go and come upon the sea without impediment.³ But while this provision of *magna charta* only extended to the waters of the sea, and the branches thereof, and did not include that class of fresh-water streams which, although *in fact* navigable by “boats and lighters,” were the private property of the riparian owners; yet, the fact that fresh-water streams were not included, by no means affords any argument for the idea that the right of passage over them was not a recognized legal right. The purpose of *magna charta* was to prevent the king, because of his ownership of the bed of the sea within certain limits, and of the branches of the sea, from imposing unreasonable restrictions upon its use by the people. In fresh-water streams, the king was not the owner of the alveus of the stream, and could not impose restrictions which the courts could not control, therefore no necessity existed for any provision in reference thereto.

SEC. 578. All such streams were regarded as private property for all purposes, except as highways for commerce, and the burden of establishing this right seems to have been upon those who claimed to exercise it.⁴ And while there are no cases in which such streams seem to have been held subject to this public ease-

¹ Woolrych on Waters, 40, 41.

² Hale's De Jure Maris, ante.

³ Warren v. Prideaux, 1 Mod. 105.

⁴ In Fitzwalter's Case, 1 Mod. 106, the plaintiff, who was lord of a manor upon a navigable stream above the ebb and flow of the tide, claimed the exclusive right to fish in the stream adjoining his

land. Lord HALE in disposing of the case held that this was *prima facie* a private river, and the property of the plaintiff, although navigable, and that if the defendant claimed a free fishery therein because it was a branch of the sea or upon any ground, he must establish it by proof.

ment, unless they had become so by immemorial user or by express statute, yet the reason is to be found in the fact that all that were capable of that use, had been so used by common consent, and not because the principles of the common law were not broad enough to cover them.¹ In all fresh-water streams of navigable capacity, according to Lord HALE, the "King had, by an *ancient right of prerogative*, a certain interest," and he defines this interest of the crown as follows: "*First*" he says "*a right of franchise or privilege*, that no man may set up a common ferry for all passengers, without a prescription time out of mind, or a charter from the king."

"*Secondly, An interest*, as I may call it, *of pleasure or recreation*," but it is proper to say that he afterward refers to this interest as being obsolete, in England, in fresh-water streams.

"*Third, An interest of jurisdiction*, viz.: in reference to common nuisances in or by rivers, as, where the sewers were not kept, which gave rise to the commission of sewers, as well for fresh rivers as for salt." These interests are interests of the king as well in waters which are strictly private, as in those subject to the public easement of navigation. In those streams which were regarded as navigable by reason of their having been declared so by statute, or because of their use in that way, for an immemorial period, the king not only had all the interests previously named, but also, in the language of the learned author, "jurisdiction to reform and punish nuisances in *all* rivers, whether fresh or salt, that are a common passage, not only for ships and greater vessels, but also for smaller, as barges or boats. To reform the obstruction or annoyances that are therein, to such common passage; for," he adds, "as the common highways on the land are for the common land passage, so these kind of rivers, whether fresh or salt, that bear boats or barges, are highways by water; and, as the highways by land are called '*altæ viæ regiae*,' so those public rivers, for public passage, are called '*fluvii regales*'

¹ In the argument of Ball v. Herbert, 3 T. R. 254, WILSON, Sergt., made the broad statement, that except the River Severn and Thames, there were few if any rivers in the kingdom that were regarded as navigable, except where they had been made so by statute, and this statement seems to have been

accepted as correct. But, even if this statement is to be taken in its broadest sense, it does not *exclude* but rather *includes* the idea that other streams, navigable *in fact*, were subject to the easement of passage, even though they had not become so by prescription or act of parliament.

and '*haut streames le Roy*,' not in reference to the propriety of the river, but to the public use; all things of public safety and convenience being in a special manner under the king's care, supervision and protection. And therefore the report in Sir JOHN DAVY's Reports of the piscary of the River Banne mistakes the reason of those books that call these '*streames le Roy*,' as if they were so called in respect of propriety, as 19 *Ass.*, 6 *Dy.* For they are called so, because they are of *public use* and under the king's special care and protection, *whether the soil be his or not.*" I have given these extracts, at length, from Lord HALE's work, because it is regarded as the clearest and most reliable statement of the common law as applicable to streams of the character referred to, and has been frequently pronounced as authoritative by the courts both of this country and England.¹

SEC. 579. In this country, so vast in its extent and almost boundless in its resources, with myriads of inland rivers capable of being turned to profitable account, not only as avenues of commercial intercourse between the several States, but often with all the countries of the globe, the rules of the common law were found to be too limited, too narrow, to be applied to them, so that, while adopting all the common law that was applicable thereto, yet the courts have greatly enlarged and extended the law, and the *real* test of navigability, is made to depend upon the capacity of the stream in its natural state to subserve the ends of commerce or trade, without any reference to the ebb and flow of the tide, or as to whether it has become so by long usage or by express statute, or to its capacity to afford passage for boats or lighters. All streams are regarded as *publici juris* to the extent that they may be used by the public for the purposes of passage when in their natural state they are capable of serving a useful purpose in developing the resources of the country, and bearing its products, either in a rough or manufactured state, to mills or markets.²

¹ Arnold v. Mundy, 1 Halst. (N. J.) 1; People v. Platt, 17 Johns. (N. Y.) 195; People v. Vanderbilt, 26 N. Y. 154; Morgan v. King, 35 id. 354; Adams v. Pease, 2 Conn. 481; Claremont v. Carleton, 2 N. H. 367; Ex parte Jennings, 6 Cow. (N. Y.) 518, in which the first four chapters of De Jure Maris are published.

² Shrunk v. Schuylkill Nav. Co., 14 S. & R. (Penn.) 71; Collins v. Binbury, 3 Ired. (N. C.) 30; Bullock v. Wilson, 2 Port. (Ala.) 456; Cates v. Waddington, 1 McCord (S. C.), 580; Com'rs v.

SEC. 580. The test by which to determine the navigability of our rivers and streams is to be found in, and determined by their actual navigable capacity for any useful purpose, and those rivers that are navigable *in fact* for useful purposes, and serve as a means of commercial intercourse either between points in the same State, or between States, are regarded as navigable, and are subject to that servitude irrespective of prescriptive use or statutory enactment.¹ This is a part of our common law, created by necessity, and applied by common consent, and, while there is some conflict in the cases, as to the relative rights of the public and of riparian owners, in this class of streams, yet in the main, I think our courts have exhibited less conflict upon this subject, and much more consistency than might have been expected to result from such a variety of questions as arise, and the varied conditions under which they are presented.

SEC. 581. There is yet another class of streams which, although not navigable by "boats or lighters," are yet susceptible of valuable use for the purpose of floating logs and other products of the country along its banks to market or to mills, and which are *floatable* in fact, and regarded as *quasi* navigable.*

SEC. 582. In most of the States while the test of navigability is made to depend upon the capacity of the stream for that purpose, even though it be a fresh-water stream, yet all streams in

Hemphill, 26 Wend. (N. Y.) 404; Morgan v. King, 35 N. Y. 454; Weise v. Smith, 3 Or. 445. See Folger v. Pearson, 3 id. 455; Tomlin v. Railroad Co., 32 Iowa, 106; The Daniel Ball, 10 Wal. (U. S. S. C.) 557; The Montebello, 11 id. 411; Chicago v. McGinn, 51 Ill. 266; Volk v. Eldred, 23 Wis. 410; Scott v. Wilson, 3 N. H. 321; Georgetown v. Alexandria Canal Co., 12 Pet. (U. S.) 91; Varick v. Smith, 9 Paige's Ch. (N. Y.) 278; Wadsworth v. Smith, 2 Fair. (Me.) 278; Veazie v. Dwinel, 50 Me. 496; Knox v. Chaloner, 42 id. 150; McManus v. Carmichael, 3 Iowa, 1; People v. Tibbits, 19 N. Y. 523; Hooker v. Cummings, 20 Johns. (N. Y.) 90; Palmer v. Mulligan, 3 Caines (N. Y.), 307.

¹ The Daniel Ball, 10 Wal. (U. S. S.

C.) 557; The Montebello, 11 id. 411; Chicago v. McGinn, 51 Ill. 269.

* Morgan v. King, 35 N. Y. 454; Laney v. Clifford, 54 Me. 491; Brown v. Chadborne, 31 id. 9; People v. Canal Appraisers, 33 N. Y. 472; Weise v. Smith, 3 Or. 445; Palmer v. Mulligan, 3 Caines' Rep. (N. Y.) 307; Lorman v. Benson, 8 Mich. 18; Middleton v. Flat River Booming Co., 27 Mich. 533; Davis v. Winslow, 51 Me. 264; Veazie v. Dwinel, 50 id. 474; Magnolia v. Marshall, 39 Miss. 126; Com. v. Chapin, 5 Pick. (Mass.) 199; Volk v. Eldred, 23 Wis. 410; Stuart v. Clark, 2 Swan. (Tenn.) 9; Rhodes v. Otis, 33 Ala. 578; Nearderhauser v. State, 28 Ind. 270; Moore v. Sanborne, 2 Mich. 523; Ellis v. Carey, 30 Ala. 725; Hubbard v. Bell, 54 Ill. 112.

which the tide ebbs and flows are regarded as navigable in law, and the rules of the common law applicable thereto, so far as the rights of the State and riparian owners are concerned, are adopted.¹ In all the cases referred to in the previous note, it is held that, while other streams than those in which the tide ebbs and flows to the point where the tide ceases to affect them, are navigable, yet the public do not have the same right of property in the *alveus* of fresh water, as in tide-water streams, and that on all fresh-water streams the owner of the banks also owns the bed of the stream to the "*medium filium aquae*," while in those affected by the ebb and flow of the tides, the title to the bed of the stream is in the State, and the titles of the riparian owners are restricted to high-water mark.²

¹ In *Avery v. Fox*, 1 Abb. Ch. Rep. (U. S.) 246, it was held that the owner of land bordering upon a stream, though navigable, in which the tide does not ebb and flow, is presumed to be the owner of the bed of the stream to the center thereof. *Com'r's v. People*, 5 Wend. (N.Y.) 355; *Shaw v. Crawford*, 10 Johns. (N. Y.) 236; *People v. Tibbetts*, 19 N. Y. 523; *Com'r's v. Hemp-hill*, 26 Wend. (N. Y.) 404. See *Morgan v. King*, 35 N.Y. 454; *Gray v. Burdick*, 20 Pick. (Mass.) 186; *Trustees v. Dickinson*, 9 Cush. (Mass.) 544; *Com. v. Chapin*, 5 id. 190; *Scott v. Wilson*, 3 N. H. 321; *Middleton v. Page*, 8 Conn. 221; *Chapman v. Kimball*, 9 id. 38; *Spring v. Seavey*, 8 Me. 188; *Berry v. Carly*, 3 Greenl. (Me.) 269; *Brown v. Kennedy*, 5 H. & Johns. (Md.) 195; *Hays v. Bowman*, 1 Rand. (Va.) 417; *Lamb v. Ricketts*, 11 Ohio, 311; *Gavit v. Chambers*, 3 Ham. Rep. (Ohio) 495; *Cates v. Waddington*, 1 McCord (S.C.), 580; *McCullough v. Wall*, 4 Rich. (S. C.) 68; *Stuart v. Clark*, 2 Swan (Tenn.), 9; *Magnolia v. Marshall*, 39 Miss. 109; *Com'r's v. Withers*, 29 id. 21; *Morgan v. Reading*, 3 S. & M. (Miss.) 366; *Mariner v. Schultz*, 13 Wis. 692; *Walker v. Shepardson*, 4 id. 486; *Schurmiur v. Railroad Co.*, 10 Minn. 82; *Lorman v. Benson*, 8 Mich. 18; *Middleton v. Pritchard*, 3 Scam. (Ill.) 500; *Cox v. The State*, 3 Black. (Ind.) 193; *Hubbard v. Bell*, 54 Ill. 110; *Warren v. Chambers*, 25 Ark. 120; *State of Penn. v. The Wheeling Bridge Co.*, 18 How. (U. S.) 421.

² *Hale's De Jure Maris*; *Trustees v.*

Bootle-cum-Linacre, L. R. 2 Q. B. 4. In *Rex v. Smith*, 2 Doug. 441, it was held that the soil of a navigable stream is not, by presumption of law, in the owner of the banks, but in the king; but that the title of the soil in all streams in which the tide does not ebb and flow is in the riparian owner. In that case a nice question arose as to what point in a stream in which the tide ebbs and flows the navigability of the stream ends. The city of London under certain supposed powers, delegated to it by act of parliament, erected piles on the bed of the river Thames near *Richmond*, within the high-water mark, some 36 feet from the shore, for the purpose of making a towing-path for horses, adjoining and contiguous to a wharf in the possession of the defendants. The defendants believing the towing-path and piles to be in violation of their rights, and a nuisance, cut away one of the piles, for which they were indicted. The defendants insisted that the tide did not ebb and flow in the Thames above London bridge, and that above that point it was kept navigable by artificial means, and that the tide above that point was occasioned by the pressure and accumulation backward, of the river water, and that, therefore, the soil did not belong to the crown. Lord MANSFIELD said: "The distinction between rivers, navigable and not navigable, and those where the sea does not ebb or flow, is very ancient; but the point contended for, a distinction between the case of the tide occasioned by the flux of the

SEC. 583. In New York it is held that on all the larger navigable rivers of the State above the ebb and flow of the tide, which are boundaries between States, or which are highways for commerce between States, the title of riparian owners is restricted to high-water mark, as also upon all streams navigable in their natural state, which have been declared navigable by statute.¹ It also seems to be the doctrine of the courts of that State, and indeed the doctrine of all the courts, that the waters of a stream in their natural condition, susceptible of beneficial use for the purposes of navigation and commerce, are *publici juris*, and may be declared navigable by the legislature, and become subject to all the restrictions of navigable streams, without compensation to riparian owners for injuries sustained. But that the legislature has not the constitutional power to declare a stream navigable that is not so in fact, and which can only be made navigable by artificial means, without proper compensation to riparian owners

sea water, or by the *pressure backward* of the *fresh water* of a river seems to be entirely new, but there were no facts set forth in the case, which let in the consideration of that distinction. The case does not state whether the water, when the tide rises at Richmond, *was fresh or salt*, but it rather seems to be taken for granted that it was *salt*." A verdict was rendered *against* the defendants, which was sustained in the king's bench.

In *Attorney-General v. Wood*, 108 Mass. 36; 11 Am. Rep. 380, a similar question arose in reference to the rights of the public and riparian owners upon the Mystic river above the point of navigability in fact, except for skiffs and small pleasure boats, but within the ebb and flow of the tide. It appeared that the tide rose and fell at the point in question about two feet, and that the ordinary depth of the channel was about the same. The defendant erected a dam at the point in question, in 1851, and maintained it there until 1870, when it was destroyed. The river is a small stream flowing into Boston harbor, and the defendant denied that it was navigable *in fact*; and it did not appear that it was, except for small pleasure boats. He also denied that it was navigable in law, and insisted that although the rise and fall of the water

there, was two feet, that it was occasioned by the meeting of the salt-water of the tide with the fresh water of the stream on its downward passage. But upon this point the court said: "The law on this point is well settled. *It is the rise and fall of the water*, and not the proportion of salt water to fresh, that determines whether a particular portion of a stream is within tide water," and the court cited *Rex v. Smith*, ante; *Peyroux v. Howard*, 7 Pet. (U. S. S. C.) 324, and *Lapish v. Bangor Bank*, 8 Me. 85, in support of its position.

In reference to the actual navigability of the stream, except for pleasure craft, the court said: "Navigable streams are highways, and a traveler for pleasure is as fully entitled to protection in using a public way, whether by land or water, as a traveler for business. * * * If water is navigable for pleasure boating, it must be regarded as navigable water, though no craft has ever been upon it for the purposes of trade or agriculture," thus overruling the doctrine of *Rowe v. Granite Bridge Co.*, 21 Pick. (Mass.) 344; *Charlestown v. County Com'rs*, 3 Metc. (Mass.) 202, and *Murdock v. Stickney*, 8 Cush. (Mass.) 113.

¹ *The People v. Canal Appraisers*, 33 N. Y. 461.

for the damages inflicted upon them in depriving them of the use of the streams for ordinary purposes.¹

SEC. 584. In several of the States no distinction is made between the rights of riparian owners upon fresh water streams, navigable in fact, and those streams affected by the ebb and flow of the tide. But the same rule prevails as to *all*, and the bed of all navigable streams is held to be vested in the State.²

SEC. 585. In several of the States where it is held that the title to the beds of the streams are in the State, the titles of riparian owners are extended to low-water mark, thus vesting in them the power and the right to erect and maintain wharves in front of their property, where it can be done without actual impediment to navigation.³

SEC. 586. Thus it will be seen that, in this country, there are three classes of navigable streams:

1st. Tidal streams that are navigable in law.*

2d. Those that, although non-tidal, are yet navigable *in fact* for "boats or lighters" and susceptible of valuable use for commercial purposes; and

3d. Those which are *floatable*, or capable of valuable use in bearing the products of the mines, forests, and tillage of the country it traverses to mills, or markets.⁴

¹ Morgan v. King, 35 N. Y. 454; Walker v. The Board of Public Works, 16 Ohio, 540.

² Shrunk v. Schuylkill Co., 14 S. & R. (Penn.) 71; Bridge Co. v. Kirk, 46 Penn. 112; Ellis v. Carey, 30 Ala. 725; Bullock v. Wilson, 2 Porter (Ala.), 436; Ingraham v. Threadgill, 3 Dev. (N. C.) 59; Collins v. Benbury, 3 Ired. (N. C.) 277; Stuart v. Clark, 2 Swan (Tenn.), 9; Elder v. Burns, 6 Humph. (Tenn.) 358; Haight v. Keokuk, 4 Iowa, 199; McManus v. Carmichael, 3 Clarke (Iowa), 1; Tomlin v. DuBuque, 33 Iowa, 106; Attorney General v. Wood, 108 Mass. 86.

³ Qualifiedly in McManus v. Carmichael, 3 Iowa, 1. But *contra* Haight v. Keokuk, 4 id. 199; Tomlin v. DuBuque, 32 id. 106; Elder v. Burns, 6 Humph. (Tenn.) 358; Stuart v. Clark, 2 Swan (Tenn.), 9; Blanchard v. Por-

ter, 11 Ohio, 138. But later, that the title of riparian owners covers the bed of the stream if he owns on both sides. Walker v. Board of Public Works, 3 Hammond (Ohio), 495; Howard v. Ingersoll, 17 Ala. 780; Rhodes v. Otis, 33 id. 33; Ellis v. Cary, 30 id. 725; Flanagan v. Philadelphia, 42 Penn. St. 219; Bridge Co. v. Kirk, 46 id. 112; East Haven v. Hemmingway, 7 Conn. 186.

⁴ The Royal Fishers of the River Banne, Davy's Rep. 143.

⁵ The Daniel Bell, 10 Wall. (U. S.) 555; The Montebello, 11 id. 411; Chicago v. McGinn, 51 Ill. 269.

⁶ Rhodes v. Otis, 33 Ala. 578; Weise v. Smith, 3 Oregon, 445; Morgan v. King, 30 Barb. (N. Y. S. C.) 9; affirmed Ct. of Appeals, 35 N. Y. 454; McManus v. Carmichael, 3 Iowa, 1; Veazie v. Dwinnell, 54 Me. 160; Lorman v. Ben-

Sec. 587. It should be understood that, except in salt-water streams, so far as the tide ebbs and flows, the question of navigability is one of fact, and must be established by those who seek to use it as such;¹ and also, that the stream must be navigable in its *natural* state, unaided by artificial means or devices.² If a stream is not susceptible of *valuable* use to the public as a navigable or floatable stream, without the erection of dams, it is not a navigable stream, even though it might be applied to that use after dams are erected. So, too, it must be susceptible of use for a considerable portion of the year,³ although the fact that it is dry at some seasons of the year, if for a considerable time at other seasons it is really floatable, will not destroy the public right of navigation.⁴ So, too, in order to make a stream legally *floatable*, and thus a public highway, it must be in such a condition that it will float logs or other productions of the country without artificial aid. Thus, in one case, it was held that a stream that would not float logs, without the aid of a person in a canoe or of people on the banks to push them along, and when the logs were frequently injured by the difficulty in passing them through, the stream was not navigable in any sense.⁴

The stream must be of such a character and capacity that it can be profitably and advantageously used during certain seasons of the year in its natural state, for the passage of the products of the country through which it passes; but, while a stream that cannot at any season of the year be turned to profitable account for this purpose is not *floatable* in the legal sense, yet, if in its

son, 8 Mich. 18; State v. Canterbury, 28 N. H. 195, navigable by usage; Scott v. Wilson, 2 N. H. 321. (Connecticut river above the ebb and flow of the tide held to be navigable for rafts and logs by long user.) See also Shaw v. Crawford, 10 Johns. (N. Y.) 286; Pitkin v. Olmstead, 1 Root (Conn.), 217, in which it is held that Connecticut river above the tide is common to all. Bullock v. Wilson, 2 Port. (Ala.) 436; Martin v. Bliss, 5 Blackf. (Ind.) 35; Depew v. Canal Co., 5 Ind. 8; Young v. Harrison, 6 Ga. 130; Jones v. Water Lot Co., 18 id. 539; Harrington v. Edwards, 17 Miss. 586; Dalrymple v. Mead, 1 Grant's Cases (Penn.), 197; Hubbard v. Bell, 54 Ill. 110; Lincoln v.

Chadbourne, 56 Me. 157; Hooper v. Hobson, 57 id. 273; Folger v. Pearson, 3 Oregon, 455; Valk v. Eldred, 23 Wis. 410; Munson v. Hungerford, 6 Barb. (N. Y.) 265; Varick v. Smith, 5 Paige (N. Y.), 148; Dwinell v. Veazie, 44 Me. 167.

¹ McManus v. Carmichael, 3 Iowa, 1; Rhodes v. Otis, 33 Ala. 578; Morgan v. King, 35 N. Y. 454.

² Morgan v. King, 35 N. Y. 454; Beryl v. Carl, 3 Me. 209; Wadsworth v. Smith, 2 Fair. (Me.) 276.

³ People v. Tibbetts, 19 N. Y. 523; Reynolds v. McArthur, 2 Peters (U.S.), 417.

⁴ Morgan v. King, 35 N. Y. 454.

natural state, it is susceptible of profitable use for such purposes at some seasons of the year, the fact that dams are erected, and that by the aid of those dams alone it is susceptible of such use at other seasons of the year, than those in which it would otherwise be used, does not prevent its use for such purposes at any season when, by the aid of such dams, it *can* be used.¹

SEC. 588. No definite legal test, by which to determine the question of navigability for the purposes of *floatage*, can be given. It is purely a question of fact, dependent upon the capacity of the stream, the products of the country, and the profitableness or unprofitableness of its use in that manner.² If, in its natural state, it is capable of floating vessels, rafts, logs or other products of the country to market or to mills, and in that respect is fairly susceptible of beneficial use to the public, for any considerable portion of the time, then it may be used by the public for that purpose, but the owner of the *alveus* of the stream is not thereby

¹ Volk v. Eldred, 23 Wis. 410; Moore v. Sanborne, 2 Mich. 423; Wadsworth v. Smith, 11 Me. 278; Naederhouser v. State, 28 Ind. 270; Veazie v. Dwinel, 50 Me. 479.

² Morgan v. King, 35 N. Y. 454. The natural capacity of the stream must be such as to make it serve a useful purpose to the public, as a means of floating the products of the country to mills and markets. Hence if it can be used only by a few individuals, and only for a few weeks in each year, it is not regarded as a public stream. Munson v. Hungerford, 6 Barb. (N. Y.) 265; Burrows v. Gallup, 32 Conn. 501. Nor unless it is capable of use without deepening or widening, or other artificial means, as by a dam. Volk v. Eldred, ante, or digging out the channel or widening the stream. Wadsworth v. Smith, 11 Me. 278; Veazie v. Dwinel, 50 id. 479; People v. Platt, 17 Johns. (N. Y.) 195. It must serve a useful public purpose, so as fairly to be said to be of a public character, and beneficial as a public highway for the outlet of the products of the country it traverses. Curtis v. Keeler, 15 Barb. (N. Y.) 511; Hubbard v. Bell, 54 Ill. 112; Treat v. Lord, 42 Me. 552; Brown v. Chadbourne, 31 id. 9; Morgan v. King, 18 Barb. (N. Y.) 277; 35 N. Y.

(Ct. of Appeals) 454; Walker v. Shepardson, 4 Wis. 486; Stuart v. Clark, 2 Swan (Tenn.) 9; Moore v. Sanborne, 2 Mich. 253; Weise v. Smith, 3 Oregon, 445; Falyer v. Robinson, id. 458; Naederhouser v. State, 28 Ind. 270; Rhodes v. Otis, 33 Ala. 578; Laney v. Clifford, 54 Me. 489. In such streams it is not necessary that they should be susceptible of navigation against the current. Morgan v. King, ante; Lorman v. Benson, 8 Mich. 18. But, upon the authority of *all* the cases, it must be susceptible of bearing the products of the country in a state fit for market, so as really to serve a valuable and beneficial public purpose. Whether it is navigable for such purpose is a question of fact, and must be established by those asserting the right to use it for that purpose. Rhodes v. Otis, ante. In determining the question of navigability, it is the *valuable* more than the *continual* capacity that is to be considered. The real question is, can it be made a *valuable* and *beneficial* aid to the public in getting the products of the country to market. Lorman v. Benson, ante; Rice v. Ruddington, 19 Mich. 125; Drawbridge Co. v. Halliday, 4 Ind. 36; Martin v. Bliss, 5 Blackf. (Ind.) 135; Depew v. Canal Co., 5 Ind. 8; Moore v. Sanborne, 2 Mich. 518

prevented from using the stream in all ways and for all purposes not inconsistent with its use by the public.¹

The riparian owner may apply the water to use for the propulsion of machinery, and for that purpose may erect a dam across the stream where the stream is simply *floatable*, leaving suitable ways for the passage of logs and other products.² The right of the public for passage with logs, etc., is superior to the right of the riparian owner, and if he erects obstructions in the stream which prevents, endangers or materially hinders the passage of rafts or logs, whether such obstruction is in the form of a dam or otherwise, such obstruction is a nuisance and subjects the person making it, not only to an action for the damages sustained by the owners of rafts or logs obstructed by it, but also to indictment as for a public nuisance, and the person so injured by the obstruction may abate so much of the same as is necessary to secure the proper exercise of his right.³

SEC. 589. But, while the right of passage for the public must on the one hand be respected by the riparian owner, so on the other hand must the rights of the riparian owner be respected by the public, and where a river is merely *floatable* the public have no right to so use it as to destroy its beneficial use for manufacturing purposes.⁴ Thus it has been held that persons using a *floatable* stream have no right to erect dams thereon, and thereby detain and hold the water to be let off in such a manner as to aid in the floating of logs, when, by such dams, the water is withheld from mill-owners below to their injury, even though except for such dams the stream could not be used for floatage at certain seasons of the year.⁵

SEC. 590. In *Rhodes v. Otis*, 33 Ala. 578, the court says:

¹ *Lorman v. Benson*, 8 Mich. 18; *Lancy v. Clifford*, 54 Me. 491; *Morgan v. King*, 18 Barb. (N. Y.) 277; *Scofield v. Lansing*, 17 Mich. 437. See note in *Washington on Easements*, p. 507; *Avery v. Fox*, 1 Abb. (U. S. C. C.) 246; *Yates v. Milwaukie*, 10 Wal. (N. S.) 497.

² *Scofield v. Lansing*, 17 Mich. 437; *Thurman v. Morrison*, 8 B. Munr. (Ky.) 367; *Douglass v. State*, 4 Wis. 387.

³ *Renwick v. Morris*, 7 Hill (N. Y.),

575; *Memphis R. R. Co. v. Hicks*, 5 Sund. (Tenn.) 427; *Barnes v. Racine*, 4 Wis. 454; *Barrows v. Pixley*, 1 Root (Conn.), 363; *Brown v. Watrous*, 47 Me. 161; *Gerrish v. Brown*, 51 id. 256; *Veazie v. Dwinel*, 50 id. 479; *Knox v. Chaloner*, 42 id. 156; *State v. Freeport*, 43 id. 198; *Powers v. Irish*, 23 Mich. .

⁴ *Scofield v. Lansing*, 17 Mich. 437.

⁵ *Middleton v. Flat River Booming Co.*, 27 Mich. 533.

"The question is, whether the stream is fit for *valuable* floatage; whether the public generally are interested in transportation on it; whether its capacity continues long enough to make it beneficially useful to the public, and to important public interests; whether it has been generally used for important floatage; and whether it will be useful for future public use? These are questions of fact which must be established by the party seeking to enforce the right." And the court adds, "Whether a stream is navigable, is a question of law, after the facts as to the above points have been ascertained." Thus placing the whole matter in its true position as a mixed question of law and fact.¹

In California, floatability is not regarded as rendering a stream navigable in any sense. In *Water Co. v. Amsden*, 6 Cal. 443, the court say: "A river above the ebb and flow of the tide may be navigable when it has sufficient depth of water, and width, to float a vessel used in the transportation of freight and passengers, and this has been extended to its capacity to float *rafts* of lumber. To go beyond this, and declare a stream navigable which can float a log, would be to turn a rule, intended for the benefit of the public, into an instrument of serious detriment to individuals, if not of actual private oppression. The only other instance in which a stream is navigable, is where it is so declared by statute."

SEC. 591. In reference to *non-tidal* navigable streams, which includes all the large rivers of the country devoted to the purposes of commercial intercourse between States, as well as internal streams capable of being navigated by vessels from one point to another in the same State, as also all tidal streams beyond the point where they are affected by the flow and reflow of the tides, it may be said that they are not only regarded as highways for commerce, but also as navigable streams within the strict application of the term, except so far as the rights of riparian owners are concerned.

The principal distinction between rivers navigable *in law* and

¹ In *Wethersfield v. Lawrence*, 20 Conn. 218, the court say: "Navigation, the obstruction of which is a public nuisance, is on waters on which the public pass and repass with vessels or boats, in the prosecution of commerce that is *essentially valuable*."

rivers navigable *in fact*, arises from the difference in the rights of riparian owners. As has been before stated, riparian owners upon *salt-water* streams or arms of the sea, or upon the sea itself, have no title in any portion of the land which is covered or washed by the waters of the stream or of the sea, at ordinary spring-tide. But lands adjoining the sea, or salt-water streams that are usually dry, and are only covered with, or washed by the waters of the sea at extraordinary spring-tide, belong *prima facie* to the owner of the adjacent property, although it is covered with beach and sea-weed.¹ They are not only restricted in their title to the high-water mark, which is the outer limit of *terra firma* upon which the waters ordinarily go, but they are also precluded from making any use of the land so embraced between high and low-water mark, except for the purpose of approaching the stream or the sea, and it seems that this right is not of such an absolute character that they may not be wholly deprived of it by the State, or those acting under authority conferred by the State, without compensation for the injuries resulting to them.

SEC. 592. Mr. Angell, in his work upon Tidewaters, p. 171, lays down the doctrine broadly, that it is well settled that riparian proprietors cannot be cut off from the water against their consent, by any extraneous addition to their upland, and he cites a case in Pennsylvania² and one in New York³ in support of this doctrine.

But this doctrine has no foundation, either in principle or upon authority, so far as *tidal* streams are concerned, or fresh-water streams, placed upon the same footing. The State is the owner absolutely of the *alveus* of the stream to high-water mark, and as such owner, may devote the stream, or any part thereof, to such purposes as it sees fit, so long as it does not materially obstruct navigation. Riparian owners as such, upon this class of streams, have no more rights than any other member of the public, either in the stream, or any of the lands covered thereby. They can-

¹ Hale's *De Jure Maris*, ch. 4, p. 12; 55; Pollard's Lessees v. Hagan, 3 How. Lowe v. Gavett, 3 B. & Ad. 869, as to (U. S. S. C.) 242.
land reclaimed from the sea, see
² Ball v. Slack, 2 Whart. (Penn.) 538.
Attorney-General v. Rees, 4 De G. & J.
³ Cortelyou v. Van Brundt, 2 Johns.
(N. Y.) 357.

not erect a wharf thereon, or use any portion of the *alveus* of the stream for any purpose whatever, except in the exercise of the common right of navigation. They may cross and recross the same for the purpose of approaching the sea, and so may any other member of the public. They may use the waters of the stream for ordinary domestic purposes, and so may any one else. The owner of the bank has no *jus privatum* or special *usufructuary* interest in the water. He does not, from the mere circumstance that he is the owner of the bank, acquire any special or particular interest in the stream, over any other member of the public, except that by his proximity thereto, he enjoys greater conveniences than the public generally. To him, riparian ownership brings no greater rights than those incident to all the public, except that he can approach the water more readily, and over lands which the general public have no right to use for that purpose. But this is a mere convenience, arising from his ownership of the lands adjacent to the ordinary high-water mark, and does not prevent the State from depriving him entirely of this convenience, by itself making erections upon the shore, or authorizing the use of the shore by others, in such a way as to deprive him of this convenience altogether, and the injury resulting to him therefrom, although greater than that sustained by the rest of the public, is "*damnum absque injuria*." Thus the State may authorize the erection of wharves,¹ or the construction of embankments for railroads on the shore of tidal streams, or its use in any way that does not directly trench on the land itself of the riparian owner.² Lord HALE, in his treatise,

¹ Hale's De Jure Maris, chap. 6, p. 73; *Blundell v. Catterall*, 5 B. & Ald. 268, opinion of BEST, J.

² *Gould v. Hudson River R. R. Co.*, 6 N. Y. 522; *Tomlin v. Dubuque*, 32 Iowa, 106; *McManus v. Carmichael*, 3 id. 1; *Railroad Co. v. Stevens*, 34 N. J. 532; *Lansing v. Smith*, 8 Cow. (N. Y.) 146. In *Re Water Com'rs*, 3 Edw. Ch. (N. Y.) 306. In *Yates v. Milwaukee*, 10 Wall. (U. S.) 497, the court say that a riparian owner has certain rights as incident to his ownership of the banks, whether he owns to the center of the stream or not, and that among these are free access to the navigable part of the stream, and of erecting a land-

ing, wharf or pier for his own use or that of the public. But it will be seen by an examination of that case that this was mere *dicta*, and not involved in the actual decision of the case. By the decision of the courts in Wisconsin riparian owners, on the banks of navigable streams, own to the center thereof, and this ownership carries with it, by necessary implication, the exclusive right, as against the State or individuals, to erect piers, wharves, etc., upon the shores of the stream to low-water mark, taking care not to obstruct navigation thereby. This is a right that is incident to the land, as well as to the right to the flow of the stream in its

De Jure Maris, part 1, chap. 8, p. 11, says:¹ "The king's right of property or ownership in the sea and soil thereof, is evidenced principally in these things that follow: first, the right of fishing in the sea, and the creeks and arms thereof, is originally lodged in the crown." In chap. 6, page 73, he says:

usual quantity, quality and volume, and therefore the State has not the power to deprive him of that right without compensation, *much less* has a municipal corporation, deriving its powers from the State, the power to disturb the exercise of that right, by declaring it a *public nuisance*, as was attempted in this case. The courts have uniformly held that a municipal corporation cannot, by ordinance, make that a nuisance, which is not in *fact* a nuisance, either at common law or by statute, and it is undoubtedly true, also, that a city cannot abate a nuisance any more than an individual, unless it is specially injured thereby, or unless it is specially empowered to do so by statute. *Miller v. Burch*, 32 Tex. 208; *Welch v. Stowell*, 2 Doug. (Mich.) 323. And *then* it could only do so when the thing abated was *in fact* a nuisance. The broad statement of the court that, whether the title of the riparian owner extended to the center of the stream or not, that the riparian owner had a right of free access to the navigable part of the stream, and the right to erect wharves or piers for his own use or that of the public, is wholly unsustained by authority. When the riparian owner is restricted in his title to high-water mark, the erection of a pier, wharf or quay, without authority from the State, is a *purpresture*, and if it in any measure abridges or obstructs the navigation of the stream, it is also a *public nuisance*, and its destruction by the State or by any one specially injured thereby, is not a taking of the property of another without compensation, within the meaning of the constitution. But when the *title* of the riparian owner extends to low-water mark, or to the center of the stream, then he *may* erect wharves or piers to the limit of his boundary, if he does not thereby impede or obstruct navigation, because he then has a right of *property* in the stream itself, and to the extent of that

right, is entitled to its undisturbed enjoyment, subject, however, to the right of *eminent domain* in the State, upon proper compensation.

The case of *Buccleugh v. Metropolitan Board of Works*, 5 H. L. 418, is sometimes cited as holding a different doctrine; but an examination of that case will show that it is not at all in conflict with the doctrine of the text. In that case the plaintiff was the owner of a *manor*, called the *Montague House*, upon the bank of the river Thames. He had constructed a jetty on the shore, with steps leading to the landing, which was used by him for the convenience of his estate. The defendants, under the provisions of the 27th section of the *Thames Embankment Act*, laid out a highway on the shore of the river, running the whole length of the plaintiff's estate and destroyed his jetty, cut off his approach to the river, and deprived his estate of the washings of the river. The plaintiff brought his action for the injury resulting to him, and the question arose, not upon the rights of the plaintiff at *common law*, but under the *statute* in question. By the statute, express provision was made for *compensation for injury to river frontage*, and also for injuries to all easements, interests, rights and privileges *in or over* lands. Here was an express recognition of easements, etc., by the legislature in the shore of the river, and provision for compensation for injuries thereto. The court held that, under this statute, the easement held by the plaintiff in the water-front was an interest in lands, which entitled him to compensation for all injuries resulting therefrom. Again, the plaintiff held his estate as tenant for a term under a lease, and two agreements from the *crown*, which, in the absence of reservation, carried his right of occupancy, not merely to the shore, but to low-water mark in the stream. The court expressly disclaimed any intention to disturb the

¹ Hale's *De Jure Maris*, 53.

"Before any port is legally settled, although the propriety of the soil of a creek or harbor may belong to a subject, or private person, yet the king has his *jus regium* in that creek or harbor; and there is also a common liberty for any one to come thither with boats or vessels, *as against all but the king*. And upon this

doctrine of *Brand v. Hammersmith R. R. Co.*, 4 H. L. Cas. 171, or *Glasgow R. R. Co. v. Hunter*, 2 H. L. (Sc.) 78, in which it was held that consequential damages could not be recovered of a railroad company by a land owner when they did not amount to a taking of land. But Lord CHELMSFORD expressly based the decision upon the ground that land *was* taken within the meaning of the act. But Lord WESTBURY dissented from the judgment, on the ground that under the statute the plaintiff was not entitled to a recovery. The *real* test of the right of a riparian owner to recover for injuries resulting to his estate from the taking of the soil between high and low-water mark, is, whether he has any property or interest in the *land* taken. If he has, then all the authorities concur in holding that he may recover; *but if he has not*, there is no well-considered case in which a recovery is upheld. The same doctrine that would give to a riparian owner, whose land is not taken, consequential damages resulting from a use of the shores that diminishes his convenience or the value of his estate, would operate to entirely destroy the *dominion* that one has over his estate, and would subject land owners in the use of their property to the dictation and tastes of adjoining owners. A man, upon the same principle, would be compelled to erect buildings upon his land adapted to the style and character of his neighbor's building; lest the value of his neighbor's building should be diminished, and a lot owner in the vicinity of elegant residences would be prevented from setting up a grocery store, or other lawful trade, upon his land, because it would diminish the value of his neighbor's premises, by rendering it less desirable as a residence. But no such doctrine prevails, and no such restrictions upon the rights of the State or of individuals is recognized by the law.

In *Stevens v. Patterson*, 34 N. J. 532, BEASLEY, Ch. J., in passing upon the rights of the legislature to authorize

the construction of a railroad between high and low-water mark on the shore of a tidal stream, said: "The man who owns the land next to navigable water, is more conveniently situated for the enjoyment of the public easement, than the rest of the community. * * * But such owner has, in the *jus publicum*, by the common law, no more or higher rights than others."

In *Gould v. Hudson River R. R. Co.*, 6 N. Y. 523 WATSON, J., said, quoting from and adopting the opinion of the chancellor in *Lansing v. Smith*, 8 Cow. (N. Y.) 146: "The banks of the *Hudson*, between high and low-water mark, belong to the people, and the riparian proprietor has no better right to the use of it than any other person. If he built on it or erected a wharf there, it would be a *purpresture* which the legislature might direct to be removed or to be seized for the use of the public. Harg Law Tr. 85. Or the legislature may authorize erections in front thereof, as in case of *Smith's wharf* on the *Thames*."

In *Rex v. Smith*, 2 Doug. 425, cited ante in note to sec. 585, the defendant was indicted for removing an erection made upon piles for a towing-path *in front* of his wharf on the river *Thames*. He made the removal on the ground that the towing-path was a nuisance to his rights. The court held that the king might authorize the construction of a towing-path upon any portion of the river between high and low-water mark, even though, by so doing, the defendant was cut off from the use of his wharf.

In *Tomlin v. Dubuque*, 32 Iowa, 106, DAY, Ch. J., says: "The doctrine adduced from adjudged cases is, that by the rules of the common law the owner of land along the shore of a navigable river, is entitled to no rights, either in its shores or waters, *as an incident of his ownership*, except the contingent ones, of *alluvium* and *dereliction*" *Smart v. Dundee*, 8 Brown, 119.

In *Chapman v. Oshkosh R. R. Co.*, 33 Wis. 629, the court say that the

account, though A may have the propriety of a creek or harbor or navigable river, yet *the king may grant there the liberty of a port to B*, and so the interest of *propriety* and the interest of *franchise* be several and divided. *And in this no injury is at all done to A*, for he hath what he had before." He adds, "But if A hath the *ripa*, or bank of the port, the king may not grant the liberty to *unlade* on that bank or *ripa* without his consent, unless custom hath made the liberty thereof free to all, as in many places it is; for that would be a prejudice to the *private* interest of A, which may not be taken from him without such

doctrine of *Gould v. Hudson River R. Co.*, and the other cases cited ante. are unsound, and that a riparian owner is entitled to compensation when he is cut off from his water front on a navigable stream by the State or those acting under authority vested by the State, and the court cites the doctrine laid down by MCLEAN, J., in *Bowman v. Wathen*, 2 McLean (U. S.), 376, with approbation. But the court lost sight of the fact that the *dicta* of MCLEAN, J., quoted and approved by the court, *is not, and never was* regarded as law, either in this country or England, and that it is mere *dicta* and no part of the actual decision of the court in the case referred to. Neither do I apprehend that MCLEAN, J., intended to be understood as meaning that the right to set up a ferry vested in a riparian owner, but rather that, except under peculiar circumstances, he could prevent the exercise of such a franchise, unless his land was taken and *paid* for, *because* no one could land upon his estate without his consent. He did not intend to hold, as the case shows, that the right to maintain a ferry was incident to riparian ownership, and if he did, there is not another case, ancient or modern, in which such a doctrine is held. (See cases cited in note to Sec. 596, p. 628.) Again, *really* the case of *Chapman v. R. R. Co.*, supra, was decided correctly, and does not at all militate against the doctrine of the text. In Wisconsin, it is held that a riparian owner upon the banks of a non-tidal stream, takes to the *center of the stream*. *Walker v. Shepardson*, 4 Wis. 486, and are *presumed* to own to the middle of the channel (*Mariner v. Shultz*, 13 Wis. 692), unless restricted by the language of the grant express-

ed so as to show a clear intention to limit the grant to the shore. *Yates v. Judd*, 18 Wis. 118. It is also held that such owners may build wharves so as not to obstruct navigation (*Yates v. Judd*, ante), and this right in the soil is of such a character that it may be used for any purpose that does not interfere with the public easement therein, and the establishment of dock lines, without compensation to the owner of the soil, is unconstitutional: *Walker v. Shepardson*, 4 Wis. 486. Now, this being the recognized right of the plaintiff Chapman, as a riparian owner on Fox river, his right to recover for the damage resulting to him from being cut off from these rights by the actual taking of his land, is clear and unequivocal, and in no wise inconsistent with the doctrine of *Gould v. Railroad Co.*; *Stevens v. Railroad Co.*, or *Tomlin v. Railroad Co.*, ante.

There are cases which seem to be in conflict with this doctrine, but it will be found upon an examination of those cases, that they arise in reference to the rights of owners upon fresh-water streams where the courts have undertaken to restrict the riparian owners to high-water mark, and the reasoning of the courts is predicated upon a false basis, and therefore leads to false conclusions. Thus in *Bowman v. Wathen*, 2 McLean (U. S.), 376, MCLEAN, J., in speaking of riparian rights, says: "The riparian owner has the right of fishery, of ferry, and every other right which is properly *appendant to the soil*, etc." Now what rights in the stream, with the owner restricted to high-water mark, has he, greater than the rest of the public? What rights has he in the stream *appendant* to the land? He has not the right of ferry

consent." Here Lord HALE clearly indicates that the only restraint of the king in his control over, or power of granting special franchises in a navigable stream, as against riparian owners, is in the taking or using of the *banks* themselves. All other uses are, according to *him*, and according to the law of every well-considered case in this country or England, *damnum absque injuria*. The only prejudice to the private interest of the owner of the bank, is in the *bank* itself, and, so long as that is not disturbed, he is not deprived of a single right which is not equally possessed by every other member of the public.

SEC. 593. But this must be understood as only applicable to cases where riparian ownership does not exist, in a legal sense, for the riparian owner may, by grant from the State, be clothed with

as of common right, as will be seen hereafter, and he has not the right of fishery, except in common with all the public, unless the right has been conferred upon him by the State.

He cannot build a wharf or in any way appropriate any portion of the shore to his use; if he does, the State may proceed against him for a *purpresture*, if not for a public nuisance. He can do no act upon that part of the stream that is not equally the privilege of every other citizen. He has no *special* rights in the shore, for that is of common right, and free to all the king's subjects. *Callis on Sewers*, 55; *Somerset v. Fagwell*, 5 B. & C. 883; *Rex v. Smith*, 2 Doug. 441; *Comyn's Dig.*, tit. Navigation, 102; *Stratton v. Brown*, 4 B. & C. 485; *Fitzwalter's Case*, 1 Mod. 105; *Constable's Case*, 5 Coke, 107.

He has no rights in the stream of any kind or description that are *appendant* to his land, unless they have been specially conferred by statute. The State owns the stream and the land covered by it to high-water mark, and it may use the stream and the land it covers as it will. The State holds this title in trust for *all* the people, and as the representative of the whole public. Therefore it is that all the people have a common and equal right therein, to the full and entire extent of the title of the State, unless they are abridged by statute, custom, or prescription, and no one has any *special* or *peculiar* advantage over

another thereon, except by license or grant from the State. The necessity for this rule is obvious, and needs no support. There *are* cases, but they are rare, where courts have attempted to apply the law applicable to high-ways to tidal navigable streams. In *Clement v. Barnes*, 43 N. H. 607, the court upheld an action of trespass *quare clausum fregit* in favor of the owner of the banks against one who entered upon the shore and dug up and carried away a portion of the soil. But the doctrine of this case is not only *extraordinary*, but wholly unsupported by authority. It will be seen upon an examination of it that it bases its doctrine upon, and cites in support of it, cases applicable only to fresh-water streams. In *McManus v. Carmichael*, 3 Iowa, 1, which is a well-considered case, and entitled to weight as an authority, it was held that a riparian owner on the banks of the Mississippi river had no such interest in the soil between high and low-water mark as would enable him to maintain trespass against one who removes sand from the shore. It is somewhat difficult to understand how *quare clausum fregit* will lie at the suit of one who has no interest in the soil invaded. In *Mather v. Chapman*, 40 Conn. 382, it was held that sea-weed deposited upon the shore between high and low-water mark belongs to the first appropriator, and that the owner of adjacent land could not maintain trespass there for.

a special interest or property in the sea or stream, which endows him with rights such as are not possessed by the public generally, and which estop the State from a special, or any use of the stream or the *alveus* thereof, to his injury or prejudice, without proper compensation therefor. If a *special* right exists in the shore owner, by virtue of a grant from the State, and which is made *appendant* to his land, this special right cannot be destroyed without proper recompense, for its destruction or injury is the taking of private property, within the meaning of the constitution. Thus the State may by patent convey the land on the shore of the stream to low-water mark,¹ or it may authorize the construction of wharves, piers, quays and docks,² or it may grant the right of ferriage between opposite shores,³ or the right of fishing opposite the banks,⁴ and other uses which it is not necessary to enumerate; and when such rights have been legally conferred upon the riparian owner (and they are never incident to the land), they cannot be interfered with by the State or those acting under authority given by the State, without compensation for the injury resulting therefrom.⁵

¹ Del. & Hud. Canal Co. v. Lawrence, 9 N. Y. Sup. Ct. 60; Attorney-General v. Boston Wharf Co., 12 Gray (Mass.), 583; Winnisimmet Co. v. Wyman, 11 Allen (Mass.), 432; Nichols v. Boston, 98 Mass. 39; Morgan v. King, 35 N. Y. 454.

² Hale's de Jure Maris, chap. 6, p. 73.

³ The right to set up a ferry is a franchise which no one can exercise without a license from the State (Blissett v. Hart, Willes, 512, n), or by prescription. 2 Rolle's Abr. 140; Lansing v. Smith, 4 Wend. (N. Y.) 21; Benson v. Majorie, 10 Barb. (N. Y.) 223; Young v. Harrison, 6 Ga. 139; Dyer v. Bridge Co., 2 Porter (Ala.), 296; Stark v. McGowen, 1 N. & McC. (S. C.) 387; Nashville v. Shelby, 10 Yerger (Tenn.), 280; Somerville v. Wambish, 7 Gratt. (Va.) 205. A riparian owner may set up a ferry for his own use, but not for the use of others. Young v. Harrison, ante; People v. Mayor, etc., 32 Barb. (N. Y.) 102; Norris v. Farmers' Co., 6 Cal. 590; Johnson v. Erskine, 9 Tex. 1; Sparks v. White, 7 Humph. (Tenn.) 86; De Jure Maris, 73; Milton v. Haddon, 32 Ala. 30; Tayler v. R. R. Co., 4 Jones (N. C.), 277; Mills v. St. Clair Co., 2

Gilman (Ill.), 177; Cooper v. Smith, 9 S. & R. (Penn.) 26; Trustees v. Talman 13 Ill. 27; Murray v. Murfee, 30 Ark. 560. A ferry franchise is not an incident of riparian ownership. Patrick v. Ruffners, 2 Rob. (Va.) 209; Young v. Harrison, 6 Ga. 130; Stanford v. Mangin, 30 id. 475. All unlicensed ferries are nuisances. 3 Kent's Com. 458, 459; 3 Blackstone's Com. 219. But the State may license as many ferries to and from the same point as it chooses. Dyer v. Tuscaloosa Bridge Co., 2 Porter (Ala.), 296; R. R. v. Douglass, 9 N. Y. 444; Charles River Bridge v. Warren Bridge, 11 Peters (U. S.), 420; Bridge Co. v. R. R. Co., 17 Conn. 454; Thompson v. R. R. Co., 2 Sandf. Ch. (N. Y.) 625; Bridge Co. v. Fish, 1 Barbour's Ch. (N. Y.) 547; Toledo Bank v. Bard, 10 Ohio (N. S.), 622; Canal Co. v. R. R. Co., 11 Leigh (Va.), 42; Benson v. Mayor, etc., 10 Barb. (N. Y.) 223; R. R. Co. v. R. R. Co., 2 Gray (Mass.), 5; East Hartford v. Bridge Co., 13 How. (U. S.) 71; Shorter v. Smith, 9 Ga. 517.

⁴ Hale's de Jure Maris, chap. 6, page 73 (Hargrave's Tracts).

⁵ Bowman v. Wathen, 2 McLean (U. S.), 376.

SEC. 594. It might with as much propriety be claimed that an owner of land adjoining my land had an interest therein *because* it adjoins my land, which prevents me from making a lawful use of my land without his consent or approbation, as to hold that, when the title of the bed of a stream, as well as to the stream itself, is in the State, it has not the power to authorize its use for any purpose, without making compensation to contiguous owners for all consequential injuries. Interfering with the *convenience* of others, without taking their property, is never the subject of compensation when occasioned by those acting under the authority of the State. This has been decided in numerous instances by the courts, both of this country and of England.¹ Therefore where, as in *Iowa*² and in *New York*, upon certain of its navigable streams the title of riparian owners is restricted to high-water mark, they can be said to have no *property* or *interest* in the stream or its shore, more than any other member of the public, and as their *property* is not taken by the power of the State, their injuries, if any, are "*damnum absque injuria*."³

SEC. 595. But it should not be understood by this, that consequential damages can never be recovered when they result from acts done under legislative authority. There may be a *taking* of property within the *spirit* as well as within the strict letter of the constitution, where the injury is a mere result of the use of other property under a legislative grant. But I understand the rule to be, that when, by the use of adjoining property, for the pur-

¹ Canal Co. v. R. R. Co., 9 Paige (N. Y.), 323; Fletcher v. R. R. Co., 25 Wend. (N. Y.) 463; R. R. v. Applegate, 8 Dana (Ky.), 289; Arnold v. R. R. Co., 49 Barb. (N. Y.) 108; Smith v. Boston, 7 Cush. (Mass.) 234; Hamilton v. R. R. Co., 9 Paige (N. Y.) 171; Rex v. Morris, 1 B. & Ad. 441; Lansing v. Smith, 8 Cow. (N. Y.) 146; Steele v. Inland Locks Nav. Co., 2 Johns. 283; Harris v. Thompson, 9 Barb. (N. Y.) 350; Williams v. R. R. Co., 18 N. Y. 222; First Baptist Church v. R. R. Co., 6 Barb. (N. Y.) 313; Cochran v. Van Surley, 20 Wend. 365; Drake v. R. R. Co., 7 Barb. (N. Y.) 508; Flint v. Toledo R. R. Co., 49 Ill. 184; R. R. Co. v. Kerr, 62 Penn. St. 353; 1 Am. Rep. 471; Ely v. Rochester, 26 Barb. (N. Y.) 138; Vaughn v.

Taffe Vale R. R. Co., 5 H. N. 679; Hinchman v. R. R. Co., 2 C. E. Green (N. J.), 75; Wilson v. Mayor, 1 Den. (N. Y.) 595; Blyth v. Birmingham, 11 Exchq. 785; Macy v. Indianapolis, 17 Ind. 287; Graves v. Otis, 2 Hill (N. Y.), 466; Brand v. Hammersmith R. R., 1 L. R. Ex. 130; Turner v. R. R. Co., 16 Barb. (N. Y.) 100; Abrahams v. R. R. Co., 16 Q. B. 384; Williams v. Wilcox, 8 Ad. & El. 314; Attorney-General v. Southampton R. R., 8 Sim. 78; Proprietors v. Newcomb, 7 Metc. (Mass.) 276; Caster v. Mayor, 43 N. Y. 399; Wilson v. Black Creek Marsh Co., 2 Peters (U. S.), 245; Vassar v. R. R. Co., 42 Ga. 631.

² Haight v. Keokuk, 4 Iowa, 199.

³ The People v. Canal Appraisers, 33 N. Y. 461.

poses contemplated by the grant, the property of others is directly invaded by some physical agency that produces an actual physical invasion of the property over which it passes, or is sent, and thereby impairs the use of the property, that this is a *taking* of property which entitles the owner of the property injured to compensation, even though the invasion and damage is only occasional. But where the injury is a *remote* consequence of an act, and not a direct or necessary result, and does not operate as a physical interference with property, or impose upon it an onerous servitude, and only occurs at intervals, it is strictly consequential damage, that cannot be the subject of an action.¹

SEC. 596. In this country each State has exclusive jurisdiction and control over its inland streams that are not avenues of commercial intercourse with other States, and may deal with them as it pleases. It may authorize the erection of wharves, piers, docks

¹ *People v. Kerr*, 37 Barb. (N. Y.) 357; *Pumpelly v. Green Bay Co.*, 15 Wall. (U. S.) 166; *Rickett v. R. R. Co.*, 2 H. L. Cas. 175; *Brand v. Hammer-smith R. R. Co.*, L. R., 2 Q. B. 223; *Alexander v. Milwaukie*, 16 Wis. 247; *In Bamford v. Turnley*, 6 L. T. (N. S.) 721, the court says: "That law is a bad one, which, for public benefit, inflicts injury and loss upon a citizen without compensation."

In *Eaton v. Boston, Concord & Montreal R. R.*, 51 N. H. 504; 12 Am. Rep. 147, this question is very fully and ably discussed by SMITH, J. "If," says he, "property in land consists in certain essential rights, and a physical interference with the land subverts one of those rights, such interference takes, *pro tanto* the owner's property. The right of indefinite user is an essential quality or attribute of absolute property, without which, absolute property can have no legal existence. Use is the real side of property." *Pumpelly v. Green Bay Co.*, 15 Wall. (U. S.) 166; *People v. Nearing*, 27 N. Y. 306; *Lancaster v. Richardson*, 4 Lans. (N. Y.) 136; *Morse v. Stocker*, 1 Allen (Mass.), 150; *Yates v. Milwaukie*, 10 Wall. (U. S.) 497; *Yates v. Judd*, 18 Wis. 274; *Lee v. Pembroke Iron Co.*, 57 Me. 481; *R. R. Co. v. R. R. Co.*, 20 N. J. 61; *Alexander v. Milwaukie*, 16 Wis.

247; *Thurston v. St. Joseph*, 51 Mo. 510; 11 Am. Rep. 463; *Lackland v. R. R. Co.*, 31 Mo. 180. In this case NARTON, J., in discussing the right of the plaintiff to recover for being cut off from the beneficial use of the street in front of his premises, by the erection of a railroad thereon, said, "As to the ownership of the soil of the street, the question is of no practical importance. The right of an owner of a lot in a town to the use of the adjoining street, is as much property, as the lot itself, and the legislature can no more deprive a man of one, than the other, without compensation." See *Atkinson v. Phila. & Trenton R. R. Co.*, 14 Haz. Pa. Reg. (U. S. C. C.) 10, where an injunction was refused to restrain the laying of a railroad track along a highway, unless it was established that the plaintiff's property was to be affected thereby and some private right invaded. *Cincinnati College v. Nesmith*, 2 Cin. (Ohio) 24; *Stale v. Lanerack*, 34 N. J. 201; *Richardson v. Vt. Central R. R. Co.*, 25 Vt. 465. In *People v. Manhattan Gas Light Co.*, 64 Barb. (N. Y.) 55, it was held that while the legislature might license a public nuisance, it could not authorize a use of property that worked a violation of private rights, without compensation. See *Adams v. R. R. Co.*, 18 Minn. 263

or dams, thereon, or the erection of bridges over them, or even divert the water thereof, and entirely destroy their navigability; and upon such streams, whatever is done by individuals strictly within the scope of the power given, is lawful, and cannot be regarded either as a public or private nuisance.¹

¹ In *Bailey v. Philadelphia R. R. Co.*, 4 Harrington (Del.), 489, it was held that the State has the right of a proprietor over navigable streams *entirely* within its borders, and may obstruct, or entirely close up such streams at its pleasure. In *Glover v. Powell*, 2 Stockt. (N. J.) 211, it was held that as to small arms of the sea stretching back into the country, the legislature is the judge of their navigability for useful purposes, and may keep them open for that purpose, or deal with them at its pleasure. *Crittenden v. Wilson*, 5 Cow. (N. Y.) 165; *Bridge Co. v. R. R. Co.*, 5 Paige (N. Y.), 554; *Renwick v. Morris*, 7 Hill (N. Y.), 575; *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1; *The Daniel Bell*, 10 Wall. (U. S.) 557; *The Montebello*, 11 id. 411; *The Wharf Case*, 3 Bland's Ch. (Va.) 383; *Grant v. Davenport*, 18 Iowa, 79; *Dutton v. Strong*, 1 Black (U. S.), 1. But it must be understood that neither the state or general government can do any act that will entirely destroy the navigability of an arm of the sea, or an inter-State stream. *Cox v. The State*, 3 Black (Ind.), 193; *Bennett v. Baggs*, 1 Bald. (U. S. C. C.) 60; *Cornfield v. Caryell*, 4 Wash. (U. S. C. C.) 371; *Pollard's Lessee v. Hagan*, 3 How. (U. S.) 229. The States have the right to legislate upon all subjects affecting the police regulations of the stream. *Cornfield v. Caryell*, ante. In *Wilson v. Black Bird Creek Marsh Co.*, 2 Peters (U. S.), 245, the legislature of Delaware authorized the Marsh Company to erect a dam across a small salt-water creek, an arm of the Delaware river. The defendants, *Wilson et al.*, who were the owners of a sloop duly licensed and enrolled by the government, broke and injured the dam. The plaintiffs had a judgment in the State courts, and upon appeal to the United States court, the judgment was sustained, upon the ground that no essential right of navigation was abridged, and, as the dam had the effect of enhancing the value of property, and really wrought a public benefit, and as

the State law authorizing the dam, conflicted with no law of the general government, it could not be held invalid as being repugnant to the power to regulate commerce. See, also, *State v. Wilson*, 3 N. H. 321. But if the general government should see fit to assert its jurisdiction over such streams, there can be no question that all State laws affecting the same would have to yield to the superior jurisdiction. *Devoe v. Penrose Ferry Bridge Co.*, 3 Am. Law Reg. (U. S.) 79; *Works v. Junction R. R. Co.*, 5 McLean (U. S.), 425; *The Passaic Bridges*, 3 Wall. (U. S.) 782.

The right of the State government to partially obstruct the navigation of its tide waters has repeatedly been recognized by the federal courts, by authorizing the erection of bridges. *United States v. Bedford Bridge Co.*, 1 W. & M. (U. S.) 302; *Silliman v. Hudson River Bridge Co.*, 2 Wall. (U. S.) 403; *Works v. Junction R. R. Co.*, 5 McLean (U. S.), 425; *Columbus Ins. Co. v. Peoria Bridge Ass.*, 6 id. 60; *Jolly v. Terre Haute Drawbridge Co.*, id. 137. But this is subject to the control of federal courts. *Devoe v. Penrose Ferry Co.*, 3 Am. Law Reg. 79. And that it shall interfere as little as possible with navigation. *Columbus Ins. Co. v. Peoria Bridge Ass.*, ante. And to the further qualification that it cannot authorize any material obstruction to be placed in or over even a tributary of an inter-State or tidal stream. *Columbus Ins. Co. v. Curtenas*, 6 McLean (U. S.), 209; *Jolly v. Terre Haute*, etc., ante. In furtherance of public improvement it may authorize a partial diversion of the surplus water. *Woodman v. Kilburn Manufacturing Co.*, 15 Am. Law Reg. 238. But the public use must not be thereby impaired, or private rights injured. *Lonsdale Co. v. Moies*, 21 L. R. (U. S.) 648. And all erections in or over such streams must be of the most approved description, and supplied with the best appliances to prevent obstruction. *Packet Co. v. The Peoria Bridge Ass.*, 38 Ill. 467; *United States v. The R. R. Bridge Co.*, 6 McLean (U. S.), 517.

But if the powers of the act are exceeded, or are exercised in a manner different from that provided in the grant of authority, or if the act can be done so as not to be a nuisance, and the creation of a nuisance by the exercise of the power given is not fairly the result of the exercise of the power conferred, the grant will be no proctition, and the party doing the acts will be chargeable for a nuisance either by indictment or at the suit of persons injured thereby, the same as though there had been no color of authority given for their exercise.¹

SEC. 597. But over *tidal* streams, and in fresh-water navigable streams, that are avenues of commercial intercourse with other States, the States through which they pass have only a limited jurisdiction. The general government, under the power delegated to it to regulate commerce between the States, has the ultimate and superior jurisdiction over such streams, and the State cannot authorize any act to be done thereon that will materially interfere with their navigability. The strict doctrine that no obstruction can be made therein under State authority that in any measure interferes with navigation, is not observed, because the State is treated as having a *quasi* jurisdiction over the streams.²

¹ *Com. v. R. R. Co.*, 2 Gray (Mass.), 54; *Com. v. New Bedford R. R. Co.*, id. 339; *Com. v. Vt. & Mass. R. R. Co.*, 4 id. 22; *Renwick v. Morris*, 7 Hill (N. Y.), 575; *Lawrence v. R. R. Co.*, 16 Ad. & El. 643; *Brown v. Cayuga R. R. Co.*, 12 N. Y. 487; *Navigation Co. v. Boon*, 6 Barr. (Penn.) 379; *Harris v. Thompson*, 9 Barb. (N. Y.) 350; *Clark v. Syracuse*, 13 id. 32; *Hopkins v. Birmingham & Staffordshire R. R. Co.*, 1 L. T. (N. S.) 308; *Attorney-General v. Bradford Canal, etc., Co.*, 15 id. 9; *Davis v. Mayor, etc.*, 14 N. Y. 526; *Rex v. Pease*, 4 B. & Ad. 301.

² In *Jolly v. Terre Haute Draw Bridge Co.*, 6 McLean (U. S.), the defendants erected a bridge under authority given by the legislature of Indiana. The act provided that the bridge should be provided with a "convenient draw." The complaint was that it was not provided with such a draw, in consequence of which the plaintiff's boat was injured. DUMMOND, J., upon this point, said: "The language 'convenient draw,' imports a draw which can be passed without vexation, delay or

risks. If it meets the requirements of the act of incorporation, and is not such a one, the charter is violated. If it meets the act of incorporation and is yet a *material* obstruction to navigation, the act is a nullity for want of power in the State to authorize it."

In *Columbus Ins. Co. v. Peoria Bridge Association*, 6 McLean (U. S.), 70, the court said: "The State may authorize an erection that does not *materially* obstruct navigation. Every bridge may in a certain sense be said to be an obstruction, but that delay and risk which is inseparable from the thing which the State has the power to create, does not make it a nuisance."

In *Columbus Ins. Co. v. Curtenas*, 6 McLean (U. S.), 209, it was held that a State cannot authorize a *material* obstruction to navigation in a stream over which the general government has jurisdiction. But that a plea in bar of an action for damages arising from injuries received from such an obstruction, that merely alleges that the obstruction was erected under

Hence when an act is done therein under State authority, as the erection of a bridge, dam or other erection in or over the stream, although operating as a slight obstruction to navigation, it will not be regarded as a nuisance if the public benefit therefrom is equal to the inconvenience created thereby to navigation.¹ The common-law rule is not observed by the United States courts in dealing with obstructions to navigation created under State authority, for the reason that such acts are regarded as having been done under *quasi* authority,² and if they are really of public benefit, and aids to commerce, they will not be regarded as nuisances unless the public injury overbalances the public benefit.³ But this is subject to the restriction that the State may not authorize a *material* obstruction to navigation.⁴ And when such an obstruction, that *materially* interferes with the use of the stream for the purposes of public passage, is erected, even under authority from the State, it is a nuisance, and the party erecting it is liable for all damages resulting therefrom to individuals, and to indictment in behalf of the public, and the authority conferred by the State is no protection or defense.⁵ Neither is it any defense that the structure is useful to the public, and an essential aid to commerce as a bridge, a wharf, or other encroachment in or over the stream.⁶

SEC. 598. The State occupies to such streams the same relation

State authority, is bad. It should also allege that the erection is not a *material* obstruction. The fact that the obstruction will result in real advantage to the public does not rob it of the character of a nuisance, if it really obstructs navigation. *Works v. Junction R. R. Co.*, 5 McLean (U. S.), 424. Advantages and disadvantages cannot be balanced in such a case. *Pennsylvania v. Wheeling Bridge Co.*, 9 West. Law Jour. 535; 13 How. (U. S.) 519; *Butter v. King*, 6 Ind. 165. A wharf is not necessarily a nuisance, whether it is a question of fact. *Laughlin v. Lamasco*, 6 Ind. 223.

¹ *Devoe v. Penrose Ferry Bridge Co.*, 3 Am. L. R. 79; *Griffing v. Gibb*, 1 McA. (U. S.) 212; *Columbus Ins. Co. v. Peoria Co.*, McLean (U. S.), 70; *United States v. Bedford Bridge Co.*, 1 W. & M. (U. S.) 402; *Silliman v. Hudson R. R. Co.*, 4 Bl. (U. S.) 66, 395; *Works*

v. Junction R. R. Co., 5 McL. (U. S.) 425; *Jolly v. Terre Haute Bridge Co.*, 6 id. 237; *Atkinson v. Phila.*, etc., R. R. Co., 4 Haz. Pa. Reg. 10; *Woodman v. Kilbourn Mfg Co.*, 15 Am. Law Reg. 288; *Penn. v. Wheeling Bridge Co.*, 13 How. (U. S.) 519.

² *Griffing v. Gibb*, ante.

³ *Columbus Ins. Co. v. Curtenas*, 6 McL. (U. S.) 207; *Jolly v. Terre Haute Bridge Co.*, id. 237; *Columbus Ins. Co. v. Peoria Bridge Co.*, id. 70.

⁴ *Pennsylvania v. Bridge Co.*, 13 How. (U. S.) 519.

⁵ *Id.*; *R. R. Co. v. Ward*, 2 Black (U. S.), 485; *Works v. Junction R. R. Co.*, 6 McLean (U. S.), 428; *Georgetown v. Canal Co.*, 12 Peters (U. S.), 91.

⁶ *Pennsylvania v. Bridge Co.*, 13 How. (U. S.) 519; *The Passaic Bridges*, 3 Wall. (U. S.) 782; *Baird v. Shore Line Railroad Co.*, 6 Blatch. (C. C. U. S.) 276.

that a riparian owner on a fresh-water stream, whose title extends to the center thereof, occupies to it. It may make or authorize any use of the stream that does not essentially interfere with its proper and free use for the purposes of navigation, but beyond that it cannot go, or authorize others to go, and any wharf, bridge, dam or other erection made under State authority, that is in any essential degree an interference with the free navigation of the stream, is a nuisance, and liable to be redressed as such in the federal courts.¹

SEC. 599. Therefore it will be seen that the decisions of the United States court, involving questions of nuisance, by obstructions erected under State authority, are not authorities upon the question of *unauthorized* obstructions. As to those, the United States courts follow the common-law rule, and hold such obstructions unlawful and a nuisance, irrespective of the question of benefits, public or private, resulting therefrom. But encroachments upon the sea that do not amount to an appropriation of it, or an obstruction to navigation, or an injury to a port, are not treated as nuisances, and being purprestures merely, are tolerated where individual convenience demands it, and no public inconvenience or injury results therefrom.²

SEC. 600. The State may authorize improvements to be made in any navigable stream, tidal or non-tidal, by clearing out its bed, deepening its channel, or otherwise, but these changes must be improvements, or at least must not operate to impair navigation.³ So too, it may authorize the erection of wharves below low-water mark to render access to the port more easy and convenient, and authorize the erection of piers, slips and docks, in a reasonable manner, and, being in *aid* of navigation and commerce

¹ Packet Co. v. Atlee, 7 Am. L. R. 752. Reversed by the United States Supreme Court March 4, 1875. See Albany Law Journal of March 5th. Woodman v. Kilborn Manufacturing Co., 1 Abb. (U. S. C. C.) 158; Gilman v. Philadelphia, 3 Wall. (U. S.) 703.

² Wilson v. Blackbird Creek Marsh Co., 2 Peters (U. S.), 245. But, when a real obstruction to navigation results, the authority of the State is no pro-

tection. Gibbons v. Ogden, 9 Wheat. (U. S.) 1; Works v. Junction R. R. Co., 5 McLean (U. S.), 425; Columbus Ins. Co. v. Curtenas, 6 id. 209; Jolly v. Terre Haute Drawbridge Co., id. 518.

³ Avery v. Fox, 1 Abb. (U. S. C. C.) 246; Gilman v. Philadelphia, 3 Wall. (U. S.) 713; Palmer v. Cuyahoga Co., 3 McLean (U. S.), 226; Williams v. Beardsley, 2 Carter (Ind.), 391; Spooner v. McConnell, 5 McLean (U. S.), 337.

by furnishing facilities for the approach and safety of vessels, and for lading and unlading them, these erections will not be regarded as nuisances, unless they *materially* interfere with free navigation to the stream or port.¹ But all such erections below low-water mark are made at the peril of having them declared nuisances by the federal courts, if they unreasonably or essentially impair the convenience or safety of navigation, unless congress has conferred the power upon the State or corporation to make the erections,² or unless the title to the bed of the sea, bay or stream below low-water mark, is vested in the corporation erecting them or authorizing their erection, by grant, prior to the revolution, with authority to erect wharves, piers, etc.³

SEC. 601. The State being the owner of the *shore* of tidal streams, that is, of the space between high and low-water mark, may grant the same to individuals or corporations, and such grant vests in the grantee a *quasi* franchise, for the use of the portion of the stream so conveyed in any way that the State could use it. The title being derived *from* the State, carries with it all the rights incident to the property in the State. If the State had the right to erect a wharf on the portion of the stream covered by the grant, the grantee takes the same right as incident to the estate granted, and the State is estopped from pursuing him for a *purpresture*, unless he extends his erections beyond the limits of his grant, and can only pursue him for a nuisance when his erections amount to an actual material obstruction to navigation.⁴

SEC. 602. Any unauthorized obstruction of a navigable stream,

¹ Devoe v. Penrose Ferry Co., 3 Am. Law Rep. (U. S.) 79.

² Pennsylvania v. Wheeling Bridge Co., 13 How. (U. S.) 578.

³ In New York city, the corporation under their original charter on Manhattan island owns the lands under the East river to a point 400 feet beyond low-water mark. The ownership of the land between high and low-water mark is regarded as vesting a franchise in the owner which authorizes the erection of public or private wharves, not impeding navigation, and to charge tolls for the use of the same.

Dickinson v. Codman, 1 Sandf. Ch. (N. Y.) 214; Verplanck v. New York, 2 Edw. Ch. (N. Y.) 220; Mayor, etc., v. Scott, 1 Caines (N. Y.), 543; Killinag-smith v. Ground, 5 Whart. (Penn.) 459; Com. v. Shaw, 14 S. & R. (Penn.) 13; Ball v. Slack, 2 Whart. (Penn.) 530.

⁴ Delaware & Hudson Canal Co. v. Lawrence, 9 N. Y. Sup. Ct. 163; Williams v. Wilcox, 8 Ad. & El. 314; Abraham et al. v. The Great Western Railroad Co., 16 Q. B. 584; Attorney-General v. Southampton Railroad Co., 9 Simons, 78. See Lord Darcy v. Askwith, Hobart, 234.

whether an actual hindrance to navigation or not is a nuisance, and is indictable as such even though it is really of public advantage and a great convenience to those navigating the stream. In *Rea v. Ward*, 4 Ad. & El. 384, the defendant was indicted for erecting a causeway and wharf projecting into the harbor, and raised on a kind of platform. The causeway was originally of gravel, shingle and stone, called a hard, and sloping into the water. Subsequently the wharf was considerably lengthened, extending up the harbor. It was then raised on piles and considerably heightened, and instead of sloping down into the water as it had formerly done at the extremity, it was five feet and four inches higher than the shore. It appeared that small vessels were obstructed in their tacking, by the causeway, when pursuing their way up the harbor with the tide; also that square rigged vessels, lightermen and row boats were exposed to some inconvenience thereby, both as to navigation and landing. On the other hand, it appeared that the causeway and wharf were a great public benefit in launching and landing boats more readily, and that steamboats and other vessels could approach that wharf when they could not at others, and that vessels obtained shelter from the quay. The jury found that an impediment had been created by the causeway and wharf, but that the inconvenience was counterbalanced by the public benefit. Upon this verdict the court held that the defendants were guilty of a nuisance, and directly, and in terms overruled the doctrine of *Rea v. Russell*, 6 B. & C. 566, in which it was held that if the public benefit arising from an obstruction is equal to the public inconvenience, no nuisance could be predicated of it.

LORD DENMAN said: "I must say that if the violation of rights which belong to any part of the public is to be vindicated by the benefit which is to arise in another part of the public elsewhere, we are introducing inquiries of a most vague and unsatisfactory nature, and entering into speculations upon which no judge can be expected to decide."¹

¹ In *People v. St. Louis*, 5 Gilman (Ill.), 351, it was said: "While the State may partially obstruct navigable streams for the public benefit, yet, individuals have no such right, and where such an obstruction is made by

an individual as amounts to a nuisance, though sufficient room for passage is left, the fact that the public is *really benefited* by the obstruction, will not be considered." *Dobson v. Blackmore*, 9 Ad. & El. (Q. B.) 991; a floating-

SEC. 603. In *Rex v. Grosvenor*, 2 Starkie, 511, the defendants were indicted for erecting a wharf on the river *Thames*, to the injury of the navigation of the river. It appeared that the wharf was erected between high and low-water mark, and extended for a considerable distance along the river; and that before the wharf was erected the recess afforded a place of refuge in time of storm, and that the eddy water which it had used, afforded greater convenience for the passage of watermen. It appeared on the part of the defendants that they had rented the portion of the river occupied by their wharf from the corporation of London, who were the conservators of the river, and had a right to make or authorize such erections, between high and low-water mark, and that their wharf was a public benefit; that the projection which had existed previously had occasioned an eddy which had caused a deposit of mud in the river, and a diversion of the stream, and that the embankment would tend to remove it, and thereby be of material benefit to the navigation by removing any collection of mud.

dock cutting off access from the river. *Rose v. Groves*, 5 M. & G. 613; placing timbers in the river so as to prevent approach to plaintiff's premises. *Rex v. Ward*, 4 Ad. & El. 384; an embankment extending into a navigable river, although of great advantage to navigation, was held a nuisance, because it actually obstructed navigation. *Anonymous*, Russ. Cr. 379; a floating-dock was held a nuisance, although beneficial for repairing ships. To the same effect, *Hecker v. N. Y. Balance Co.*, 13 How. Pr. (N. Y.) 549; *Penniman v. Same*, id. 40; *Hawkins' P. C.*, chap. 75, § 11; *Rose v. Miles*, 4 M. & G. 101. Barges moored across a public river, in a manner to obstruct navigation or prevent access to the shore. *The C. D., Jr.*, Newb. Admr. 501; *King v. Sanders*, 2 Brevard (S. C.), 111. See, also, *Hart v. Mayor of Albany*, 3 Paige (N. Y.), 213; throwing ballast into the sea in a port. *Bucklesbank v. Smith*, 2 Burr. 656; *Regina v. Stephens*, 1 L. R. (Q. B.) 701; throwing rubbish from quarry into river. *Gerrish v. Brown*, 51 Me. 255; *Davis v. Winslow*, 51 id. 289; throwing edgings from logs and boards into public river. *Manhattan Gas Co. v. Barker*, 7 Robt. (N. Y.) 523; *H. R. R. Co. v. Loeb*, id. 412; Mayor,

etc., *v. Baumberger*, id. 218; refuse from breweries discharged into stream or any refuse calculated to fill up the stream or impede navigation or render the port unpleasant. *Rex v. Medley*, 6 C. & P. 292; refuse from gasworks. *Attorney-General v. Britain*, 6 B. & C. 579, cited as MS. case; a quay in river that impedes or obstructs navigation of small craft. *Rex v. Grosvenor*, 2 Starkie, 511; *Altee v. Packet Co.*, decided in U. S. Sup. Ct. Mar. 4, 1875, not yet reported; wharves below low-water mark impeding navigation. *Com. v. Crowningshield*, 2 Dane's Abr. 297; *Com. v. Wright*, Thac. Cr. Ca. 115; *Com. v. John*, 3 id. 190; *Gray v. Bartlett*, 20 Pick. (Mass.) 186. Piles driven in channel of river. *Jones v. Pettibone*, 2 Wis. 308. *Walker v. Shepardson*, 4 id. 384; pier in tidal stream. *People v. Vanderbilt*, 26 N. Y. 287; *Attorney-General v. Richards*, 2 Anstr. 603; *Attorney-General v. Burridge*, 10 Price, 107; *Newcastle v. Johnson* 2 Anstr. 505; houses erected so as to straighten river. *Rex v. Tindall et al.*, 6 Ad. & El. 143; obstruction only created by erection in extreme and exceptional cases will not be regarded as a nuisance. See *Nichols v. Boston*, 98 Mass. 39, where a wharf

ABBOTT, Ld. C. J., held that the city of London could not authorize a nuisance in the river, and in passing upon the main question in the case, he said: "The question here is, whether a public right has been infringed. An embankment of considerable extent has been constructed for the purpose of building a wharf; much evidence has been adduced on the part of the defendant for the purpose of showing that the alteration affords greater facilities and conveniences for loading and unloading; but the question is not whether any private advantage has resulted from the alteration to any particular individuals, but whether the convenience of the public at large, or of that portion of it which is interested in the navigation of the river Thames, has been affected or diminished by the alteration. * * The question is, whether if this wharf be suffered to remain, the public convenience will suffer?" Lord GROSVENOR was acquitted and the rest of the defendants were convicted.

In an early case in the United States courts the defendant was indicted for erecting a wharf upon public property in Phila-

below low-water mark was held not necessarily a nuisance. See *Wetmore v. Atlantic White Lead Co.*, 37 Barb. (N. Y.) 70, where it was held that whether a building below low-water mark is a nuisance, is a question of fact, and though *prima facie* a nuisance, is not in fact so, unless it obstructs navigation or injures the port. See *Nagles v. Ingersoll*, 7 Barr (Penn.), 185, where it was held that a wharf below low-water mark was a nuisance. *Rochester v. Erricson*, 46 Barb. (N. Y.) 92, an erection on the banks of a river flowing through a populous city, that sets back the water in an appreciable degree, so as to contribute to the overflow of its banks, is a nuisance; *Renwick v. Morris*, 7 Hill (N. Y.), 575, a dam erected on navigable stream or a bridge over it, under authority of the legislature, is a nuisance, if the power is exceeded; see *Clark v. Syracuse*, 13 Barb. (N. Y.) 32; *Crittenden v. Wilson*, 5 Cow. (N. Y.) 165; *Packet Co. v. Bridge Ass.*, 36 Ill. 467; *United States v. R. R. Bridge Co.*, 6 McLean (U. S.), 517; *Garvey v. Ellis*, 1 Cush. (Mass.) 306, a wharf extending below low-water mark and beyond dock lines is a nuisance, even though

erected before the dock lines were established; *Com. v. New Bedford Bridge Co.*, 2 Gray (Mass.), 339, a bridge erected so as to obstruct navigation, authority to do an act which may or may not be a nuisance, does not authorize it to be done so as to be a nuisance; *Com. v. Charlestown*, 1 Pick. (Mass.) 185; a highway cannot be laid out in or over a navigable stream without legislative authority; *Arundel v. McCulloch*, 10 Mass. 70, nor a bridge, *Kear v. Stetson*, 5 Pick. (Mass.) 492; *Barnes v. Racine*, 4 Wis. 454, nor between high and low-water mark; *Com. v. Chapin*, 5 id. 199; *Cox v. State*, 3 Black (Ind.), 193; *Bainbridge v. Sherlock*, 29 Ind. 364; *Morton v. Bliss*, 5 Black (Ind.), 35; *Depew v. Canal Co.*, 5 Ind. 8; *Harbor Co. v. City of Monroe*, Mich. 215; *Drawbridge Co. v. Halliday*, 4 Ind. 36; *Rice v. Ruddiman*, 10 Mich. 125. Diverting the water of a stream navigable in fact. *Yolo v. Sacramento*, 36 Cal. 193; *Gunter v. Gearey*, 1 id. 462; *Regina v. Betts*, 22 Eng. Law & Eq. 240. Driving piles in a navigable river, without lawful authority, is a public nuisance. *Potter v. Manasha*, 30 Wis. 492. So a dam sending water back on person's lands, and the owner of the lands may sue for damages, or proceed for an abatement of the nuisance. *Newell v. Smith*, 1. *Re-publican v. Cauldwell*, 1 Dallas (N. S.), 150, decided in 1783.

delphia, and upon the trial the defendant offered to prove that the wharf was a public benefit, and furnished conveniences indispensable to commerce, for the easy lading and unlading of vessels, and therefore was not a nuisance; but the court held that public benefits were no defense against a nuisance in a navigable stream.

SEC. 604. And this may be regarded as the rule in all cases of unauthorized obstructions or encroachments upon navigable streams, and the reason is apparent as well as the principle upon which the rule is predicated. No person is bound to be benefited against his will; and, while this is true as to individuals, it is equally true as to the public. No man has a right to enter upon my land and dig a trench there, without my consent, and he cannot defend against an action brought therefor, upon the ground that my land was thereby drained and rendered more valuable. He has violated my right to the exclusive enjoyment and management of my estate, and it would be contrary to all reason and authority to allow him to excuse his trespass by showing that he rendered my land more valuable to me thereby. The same principle holds good in reference to public property and public rights. Any encroachment, however slight, upon public property, whether in highways, navigable streams or streets, is a *purpresture*, which is in the nature of a trespass upon public property by an individual, and which is always open to redress by the government upon information.¹ But when the use of public property goes beyond a mere encroachment thereon, which affects the rights of the public in its aggregate capacity, and in any measure interferes with the free use thereof for the purposes for which it was designed, by individual members of the public, in the exercise of a positive right, the encroachment becomes a *purpresture* and a nuisance, however beneficial it may be in aid of the exercise of those individual rights generally.

It has sometimes been said by courts, under a mistaken idea of the *real* distinction, that a *purpresture* is *per se* a nuisance.

1. Hale's *De Jure Maris* (Harg. Tr.) 83; *Eden on Injunctions*, 260; *Attorney-General v. Johnson*, 2 Wils. 101; *Attorney-General v. Richards*, 2 Austr. 606; *Attorney-General v. Burridge*, 10 Price, 350; *Attorney-General v. Farmer*, id. 378; *Attorney-General v. Forbes*, 2 Myles & C. 123; *Attorney-General v. Cohoes Co.*, 8 Paige's Ch. (N. Y.) 133; *Bridge Co. v. R.*

Co., id. 554; *Trustees v. Cowen*, 4 Id. 510; *People v. Vanderbilt*, 28 N. Y. 287. Slight obstructions of a highway or navigable stream, which are temporary and reasonable, do not necessarily constitute a nuisance, if their advantage overcomes the detriment. *People v. Horton*, 64 N.Y. 610.

Nothing can be more absurd or erroneous. Such a definition of the term at once strikes down the broad distinction between these two classes of wrongs, and at once destroys not only the reason, but the necessity therefor. Lord HALE, in his most valuable treatise (*De Jure Maris*), in unmistakable language, defines the distinction between a purpresture and a nuisance, as well as the necessity therefor. He says: "It is not every building below the *high-water mark*, nor every building below the *low-water mark*, that is *ipso facto* in law a nuisance. For that would destroy all the keys that are in all the ports of England, *for they are all built below the high-water mark*, for, otherwise, vessels could not come to them to unlade, and none of them are built below the low-water mark. And it would be impossible for the king to license the building of a new wharf or key, whereof there are a thousand instances, if *ipso facto* a nuisance, because it straitens the port, *for the king cannot license a common nuisance*. Indeed, when the soil is the king's, the building below the *high-water mark* is a *purpresture*, an *encroachment and intrusion upon the king's soil*, which he may either *demolish or seize or arrent* at his pleasure.¹ But it is not *ipso facto* a nuisance, unless in fact it be a damage to the *port* or *navigation*. In case, therefore," adds the learned author, "of building within the extent of a *port*, in or near the water, whether it be a nuisance or not, is *questio facti*, and to be determined by a jury upon evidence, and not *questio juris*." If the distinction given by this distinguished jurist, whose statements are regarded as the highest authority upon all questions pertaining to the *common law*, both in this country and England, are not sufficient to sustain the position that a purpresture is not *per se* a nuisance; the authorities to that effect are numerous.

In *Spelm's Glossary*, title *Purpresture*, he says: "Where any invasion of the *jus privatum* of the crown in arms of the sea, or ports, takes place *by encroachment on the soil*, it is purpresture." "Where the *jus publicum* is violated, it is a nuisance; and it frequently happens that a nuisance in a port, is accompanied with a purpresture or encroachment on the soil of the crown," says Sir ALEXANDER CAMPBELL, in *Attorney-General v. Richards*,

¹ Del. and Hud. Canal Co. v. Lawrence, 9 Sup. Ct. Rep. N. Y. (Hun) 163.

2 Ansth. 606, in defining the distinction between the two classes of wrongs. In *Attorney-General v. Philpot*, cited in *id.* 607, there was no pretense that the wharf erected by the defendants was any impediment to navigation, and the erection was made by the permission of the High Admiral. But no authority from the crown was shown, and the court said that purprestures on navigable rivers ought to be abated. They accordingly ordered inquiry to be made, whether the erection *was* a purpresture, and it was afterward so found to be, and abated. It is the exclusive privilege of the State to establish and regulate ports, and to erect wharves between high and low-water mark, and it is the infringement of that right, together with the encroachment upon the soil of the stream, whether injurious to navigation or not, that creates a purpresture. If it produces an injury to the port, even though it in nowise impedes navigation, it is both a purpresture *and* a nuisance.¹ The reason is, that the public has the exclusive right in and over the property invaded, and has the right to regulate and control the use of the same, and public policy and the proper protection of the rights of individuals alike require, that no unlicensed or unauthorized interferences therewith should be permitted. A contrary doctrine would be fruitful of most pernicious results, and would be destructive of the best interests of the public; leaving important interests to the mercy of individual caprice, without system, and without legal restraint or accountability. Where the interests of the public generally are concerned, it is never politic or safe to leave their regulation or control to individual action, with all its diversity of interests and selfishness of purpose. Public interests can only be safely

¹ The City of Bristol *v.* Morgan, cited in Hale's *De Jure Maris*, p. 12; *Attorney-General v. Johnson*, 2 Wils. Rep. 101. In *Attorney-General v. Richards*, 2 Ansth. 616, McDONALD, J., in noting the distinction between purprestures and nuisances, says: "But it is argued that the prayer of the bill being to abate the erections as a nuisance, the court can only consider that question, as alone supporting the relief prayed. And it is contended that the court cannot give such a decree, or at least, not without the intervention of a jury, the question of nuisance being, as

laid down by Lord HALE, a question of fact and not of law. That may be, where the question is of nuisance only and the evidence doubtful. But the cases cited, and those which Lord HALE has given us in the *De Portibus Maris*, clearly prove that, where the king claims and proves a right to the soil, where a purpresture and nuisance have been committed, he may have a decree to abate it." And in this case, upon the ground of purpresture, the court, as a matter of law, the soil being the king's, issued a decree abating the structures complained of.

protected through the machinery of government, which acts as one mind, and with resolute purpose, and can hold all conflicting interests in check, and regulate and harmonize them, where, otherwise, there would be the wildest discord and chaos.

SEC. 605. A vessel, although not permanently located in the channel of a stream, if allowed to remain there for an unreasonable period, is regarded as a nuisance, for *all* navigable rivers are highways for commerce, and are subject to about the same rules as highways upon land in this respect. Every person may use them for the purpose of navigation; but their use must be reasonable, and such as not to conflict with a like reasonable use of them by others.¹ A vessel disabled or sunk in a navigable channel by accident is not regarded as a nuisance.²

SEC. 606. Floating docks³ and floating store-houses⁴ are public nuisances, although the one may be useful in lifting and repairing vessels, and the other in aiding the lading and unlading of vessels. But it is the special province of the State to regulate the place where such facilities shall be located, and their unauthorized erection and maintenance in a port or navigable stream, is both a preposterous and a nuisance.⁵ It is an usurpation of a public right; it is the exercise of a franchise in a port without authority of law, which is always a nuisance.⁶

But, while a wharf, floating dock, or a vessel unreasonably stationed in a navigable stream, may be public nuisances, yet, if sufficient passage is left for vessels, no person has a right to remove or injure them. But if a sufficient passage is not left, then those specially injured thereby may abate the nuisance, although it will require very clear proof of *special injury* to jus-

¹ Hart v. Mayor, 3 Paige (N. Y.), 213; Rose v. Miles, 4 M. & S. 101; Beach v. Schoff, 28 Penn. St. 195. But they must be more than interruptions to navigation. They must obstruct it. State v. Babcock, 1 Vroom (N. J.), 29; The C. D., Jr., Newb. Admr. 501; King v. Sanders, 2 Brevard (S. C.), 111.

² Rex v. Watts, 2 Esp. 675; Brown v. Mallett, 5 C. B. 599; Cummins v. Spruance, 4 Har. (Del.) 815.

³ 2 Hawkins' P. C., chap. 7, § 11; Hecker v. N. Y. Balance Co., 13 How.

Pr. (N. Y.) 549; Neal v. Henry, Meigs (Tenn.), 17; Bigelow v. Newell, 10 Pick. (Mass.) 348.

⁴ Wetmore v. Atlantic White Lead Co., 37 Barb. (N. Y.) 70.

⁵ Hecker v. New York Balance Co., 13 How. Pr. (N. Y.) 549; Penniman v. New York Balance Co., id. 40; 2 Hawkins' P. C., chap. 75, § 11; Anonymous, 1 Russ. Cr. & M. 379.

⁶ Corning v. Lowerre, 6 Johns. Ch. (N. Y.) 439.

tify the act, and injury such as is not in any wise attributable to the wrongful or negligent conduct of the person abating it.¹

SEC. 607. An obstruction of a navigable stream placed over, under, or in it, is a nuisance. Thus a bridge erected without competent authority, across a navigable stream, whether it operates as an actual obstruction to navigation or not, is a nuisance,² and when erected by authority, it must be so erected, and with all such modern appliances of draws and machinery as will make it as slight an obstruction as possible, or the authority given will not afford protection for its maintenance.³ Telegraph wires, gas pipes or any thing else placed in the bed of a tidal or inter-State stream, even by authority of the State, will be a nuisance if they in any measure interfere with prudent navigation.⁴

¹ *Bainbridge v. Sherlock*, 29 Ind. 364; *Dimes v. Petley*, 15 Ad. & El. (U. S.) 274; *Harrington v. Edwards*, 17 Wis. 386.

² *Com. v. New Bedford Bridge Co.*, 2 Gray (Mass.), 339; *Barnes v. Racine*, 4 Wis. 454; *Armsdel v. McCullough*, 10 Mass. 70; *Com. v. Charlestown*, 1 Pick. (Mass.) 185.

³ *Gilman v. Philadelphia*, 3 Wall. (U. S.) 713; *Jolliffe v. Wallasley*, 29 L. T. (N. S.) 592; *Memphis & O. R. R. Co. v. Hicks*, 5 Sneed (Tenn.), 427; *State v. Freeport*, 43 Me. 198; *State v. Dibble*, 4 Jones (N. C.), 107; *Columbus Ins. Co. v. Peoria Bridge Association*, 6 McLean (U. S.), 70; *Jolly v. Terre Haute Bridge Co.*, id. 237; *Devoe v. Penrose Ferry Bridge Co.*, 3 Am. Law Reg. (U. S.) 79; *Works v. Junction R. R. Co.*, 5 McLean (U. S.), 425.

⁴ *Milwaukee Gas-light Co. v. The Schooner Gamecock*, 23 Wis. 144. In *Blanchard v. W. U. Tel. Co.*, 3 N. Y. Sup. Ct. 775 (Pars. ed.), it was held by a majority of the court that a telegraph wire laid across a navigable stream, so as not generally to interfere with navigation, is not a nuisance, even although in special instances it might obstruct or injure vessels navigating the stream. The reasons upon which the court predicated its opinion are not given, and it is a matter of no surprise that they are not, for such a doctrine finds no authority from any of the cases, and would, if carried out, operate destructively to the interests of navigation. Whether the telegraph wires were laid

under the authority of the State or not could not operate as a protection to the defendant, for the Hudson river is an inter-State navigable stream, and the State has no authority to permit a use of it, that operates as an obstruction or injury to navigation. But if the laying of the wire was by authority, and that authority could, in any wise, operate as a protection, the question is, did the legislature contemplate or authorize the obstruction? *Could the wires have been so laid as not to be an obstruction?* If so, it must be taken that the legislature only authorized such a use of the bed of the stream as would be no hindrance or injury to navigation. The fact that but one vessel was injured, makes no difference. The wires should have been so laid that no vessel should be impeded or injured by them. *BOCKES, J.*, dissented from the majority of the court, and upon principle and authority, his dissent was well taken. But this case was reversed by the Court of Appeals, 60 N. Y. 510, and the cable held to be a nuisance. In *Milwaukee Gas Co. v. Steamer Gamecock*, 23 Wis. 144, the plaintiffs brought an action against the defendant for injuries done to its gas pipes in the bed of the Menominee river, across which was laid, for the purpose of supplying the city with gas, under the provisions of the charter. The injury complained of was occasioned by an anchor dragged by a boat which the defendant steamer was towing down the river. An ordinance of the city prohibited the towing of any vessel within limits of the

SEC. 608. Driving piles in the channel of a navigable river, so as to impede navigation, or as to produce actual injury to individual interests in the stream or on the shore, is a nuisance.¹ So is the erection of a jetty, so as to narrow the channel of the stream, or throw the water upon the opposite banks;² or the abstraction or diversion of the water of the stream, so as to interfere with its navigability;³ or the depositing of stone or any thing in the stream that chokes it, or in any manner impairs its usefulness.⁴ The erection of a dam,⁵ the building of a highway between high and low-water mark,⁶ or any permanent erection of any kind in, over or upon a navigable stream, without authority of law, is a common nuisance.⁷

SEC. 609. In *Collins v. The City of Philadelphia*, 68 Penn. St. 106, the rights of navigation, and the right of the public to use the water for any other purpose, that in any essential degree conflicts with the right of passage was ably discussed and determined. In that case, the plaintiff was the owner of a canal boat, with which he started, on the 31st of July, 1869, from Port Carbon with a load of coal for New York. A severe drought was prevailing, and it was with great difficulty that a supply of water could be obtained for the defendant city. The defendant took water from the Schuylkill river for the use of the city, and, as a necessary precaution against the calamity of an insufficient supply, made arrangements with the Schuylkill Navigation Company,

city, by any tug or vessel propelled by steam, wholly or in part, with the anchors of any such vessels being towed, dragging on the bottom of the river. There was no evidence of negligence on the part of the defendant, or that the dragging of the anchor was not a proper act of navigation. The court held that there could be no recovery. That neither a municipal corporation or the State legislature could prevent by ordinances or laws, the proper navigation of the river or the use of such precautions as proper navigation rendered necessary or advisable. In a word, the virtual doctrine of the case is, that the rights of navigation are superior to any other uses of the stream and that all other uses must be subordinate to and not an interference with it.

¹ Walker v. Shepardson, 2 Wis. 384.

² Attorney-General v. Lonsdale, 7 L. R. (Eq. Cas.) 377; Attorney-General v. Pagham Com'rs of Sewers, 8 B. & C. 355.

³ Philadelphia v. Collins, 68 Penn. St. 106; City of Philadelphia v. Gilmartin, 71 id. 140. In Attorney-General v. Great Eastern Railroad, 6 L. R. (Ch. App.) 572, the defendants were restrained from taking water from the stream to supply their station. Medway Co. v. Romney, 9 C. B. (N. S.) 575.

⁴ Regina v. Stephens, 1 L. R., Q. B. 701; Regina v. Betts, 16 Q. B. 1022.

⁵ Dunbar v. Vinal, 2 Dana's Abr. 695.

⁶ Kear v. Stetson, 5 Pick. (Mass.) 492; Charlestown v. Middlesex, 3 Metc. (Mass.) 202.

⁷ Wetmore v. The Atlantic White Lead Co., 37 Barb. (N. Y.) 70; Attorney-General v. Terry, 9 L. R. Ch. App. 423.

which controlled the canal, to draw the water down and give the defendants a supply, even at the expense of navigation. This was done, and, as a result, the water was left so low that the plaintiff could not pass with his boat from Manayunk, from the 10th of August until the 7th of September. For the damage resulting from this detention this action was brought. The court very properly held, and, indeed, it was conceded upon the trial, that the city might lawfully take water from the river necessary for domestic use by its citizens, but could not lawfully take water therefrom to propel machinery for the purpose of forcing the water of the river into their reservoir, which, in this instance, was done, and which took thirteen and a half times more water than for the reservoir, and which was shown to be at least eight times the quantity required to pass forty boats a day through Fairmount locks. THOMPSON, C. J., said: "If it was a supply of water for domestic purposes only, which occasioned the insufficiency for navigation, *then* the law of paramount necessity would have existed, and brought into play the doctrine of riparian rights, and justified the taking."

Thus, clearly recognizing the superiority of the rights of riparian owners upon a fresh-water navigable stream to the *necessary primary* use of water, even as against the right of passage; but it must be remembered, that this right attaches only where the owners of the banks *are* riparian owners, and does not exist, as against one acting under competent authority from the State, where the State owns the bed and shore of the stream.

Neither does such a right exist for any except the *primary* use of the water. If water is diverted even for *necessary*, but not *domestic*, uses, the diversion is wrongful and a public nuisance, even though the uses to which it is applied are essential and highly beneficial to the public. This was directly held in the case of *The City of Philadelphia v. Gilmartin*, 71 Penn. St. 160, which was an action for damages growing out of the same use of the water of the Schuylkill river as in the previous case, except that, in this case, it was proved that the water was not used entirely for *domestic* purposes, but that the larger proportion of it was used for baths, cleaning the city, and for mechanical purposes. The opinion of AGNEW, J., is a masterly production, and the

manner in which he disposes of the intricate questions involved, and the nicety with which he draws the lines between the conflicting rights, and the even-handed and exact measure of justice which he metes out, regardless of consequences, at once excites admiration and respect. He says: "Was this alleged wrong justified by an overruling necessity? * * * The injury, as shown by the evidence and established by the verdict, arose from the use of the Schuylkill by the city for *water-power*, and not merely for *consumption*. For every gallon of water supplied to the reservoirs, thirteen and a half gallons were expended through the turbine-wheels for driving and lifting power, and when common water-wheels were used, the expenditure was twenty-seven gallons for power to every gallon pumped into reservoirs. * * * We have already seen that the city is a large vendor of water, for all the purposes of the arts, manufacturing, business and pleasure. *These uses are not domestic*, that is, such as are necessary for the preservation of the life and health of the population and their creatures, *but are simply utilitarian or business uses*, and far exceed those needed for domestic purposes. *And even as to those termed domestic*, a distinction must be noted between the *use proper*, and that which is lavishly expended in *pavement washing, baths, etc.* It is perfectly obvious, therefore, that the city drew off water, not only for driving and lifting power, *but for a consumption far beyond any imperious necessity*, and for purposes wholly subordinate to navigation. * * I do not mean to draw any comparison between the use of water for the great purposes of industry, wealth and cleanliness of a city so populous as Philadelphia, and the use of it for navigation during a few days of drought. The question for us, *is that of legal right, not comparative weight*. Such important interests as those of the city are likely to lead to a substitution of might for right, yet they are not of that *imperious necessity which justifies might, and turns wrong into right*. Administrators of the law, we cannot bend or break the law before a *great* interest, *more than we can one that is small*. The doctrine of imperious necessity is not in this case."

SEC. 610. So, too, the pollution of the waters of a fresh-water

navigable stream, whether by turning into it the sewage of a town,¹ or the refuse from a mill,² which destroys the value of the water for domestic uses, or which produces noxious smells or unwholesome gases,³ is a public nuisance, and indictable as such at the suit of the public, and actionable at the suit of every person injured thereby,⁴ and there can be no public benefits, whether the preservation of health or otherwise, that will rob such a use of the stream of the character of a nuisance.⁵

SEC. 611. The discharge of refuse into a navigable stream from a mill or brewery, or in any way that fills up the channel or renders navigation less convenient, or that, by reason of the noxious smells emitted therefrom, renders the use of wharves uncomfortable, is a public nuisance and also a *private* nuisance, and actionable as such at the suit of any person injured thereby. And the fact that it is discharged into the stream through a public sewer will not prevent liability, if the nuisance can be directly traced, nor will the fact that the refuse complained of is mingled with the common refuse of the city, which, combined, creates the nuisance, operate as a defense, where the works complained of produce the promoting cause of the injury.⁶ And the fact that the refuse is discharged into the sewer by the permission of the city, is no defense, as the city cannot license a public nuisance, and if it was shown that it did, it would be equally liable as the actual wrong-doer.⁷

SEC. 612. While a riparian owner upon a tidal stream has no property or interest in the stream itself beyond that of any other member of the public, yet he has a right to erect a wharf or make any other erection upon the bank of the stream, and to use the same for his own convenience, or allow its use by others either

¹ Attorney-General v. Leeds, 5 L. R. (Eq. Cas.) 583; Goldsmid v. Tunbridge Wells, 1 id. 166.

² Potter v. Froment, 47 Cal. 165.

³ Goldsmid v. Tunbridge Wells, ante; Rex v. Medley, 6 C. & P. 292.

⁴ Mills v. Hall, 9 Wend. (N. Y.) 315.

⁵ Attorney-General v. Colney Hatch Lunatic Asylum, 4 L. R. Ch. App. 146; Attorney-General v. Leeds, ante.

⁶ Manhattan Gas Co. v. Barker, 7

Rob. (N. Y. S. C.) 523; Hudson River R. R. Co. v. Loeb, id. 412; Mayor of New York v. Baumberger, id. 218; Rex v. Medley, C. C. & P. 292; Regina v. Stephens, L. R. (Q. B.) 701; Rose v. Groves, 5 M. & G. 613; Gerrish v. Brown, 51 Me. 256; Davis v. Winslow, id. 289; Brucklesbank v. Smith, 2 Burr. 656; Rex v. Haddock, And. 137.

⁷ Hudson River R. R. Co. v. Loeb ante.

for the landing of passengers or freight, or any other purpose connected with navigation, and such use of his own property is no infringement of a public right. But the State may authorize a use of the *shore* that will entirely deprive him of the beneficial use of his erections, and that, too, without compensation to him for the damage sustained therefrom.¹

SEC. 613. In determining the question of obstruction it is not necessary that vessels should be actually obstructed in the navigation of the stream or harbor; it is enough if navigation is rendered less convenient or less safe than formerly. What the public are entitled to is *free* navigation and immunity from artificial impediments or dangers. If navigation in ordinary times is not impeded, or if it is not rendered more perilous, yet, if by reason of the erection of the structure, or the use of the shore, vessels in times of storm or "stress of weather" are in any measure exposed to perils that did not exist before, or if they are thereby deprived of a retreat in times of a storm or otherwise, the structure is an impediment and a nuisance, as much as though it was an actual obstacle in the way of ordinary navigation.² The rule in this respect was well given by ABBOTT, Ld. Ch. J., in *Rex v. Grosvenor et al.*, previously referred to. He said: "The public have a right to all the convenience which the former state of the river afforded, unless by the change, some greater degree of convenience is afforded. It is said that in stormy weather vessels might have entered the recess and found shelter between the two projections at spring tides for some time, at neap tides for a shorter space of time. Now, although they were not able to enjoy this benefit at all times, yet if they could derive benefit from it for the space of two hours each tide, they are entitled to that advantage, unless the want of it be compensated by some superior advantage resulting from some alteration. * * * Although the benefits which were enjoyed before the erection were limited to particular times and seasons of the weather, and were enjoyed but occasionally,

¹ *People v. Albany*, 11 Wend. 539; *Rex v. Smith*, 2 Doug. 425; *Gould v. R. R. Co.*, 6 N. Y. 522; *Stevens v. R. R. Co.*, 34 N. J. 532; *Tomlin v. Dubuque*, 32 Iowa, 106; *In Re Water Commissioners*, 3 Ed.-Ch. (N. Y.) 306; *Lansing v. Smith*, 8 Cow. (N. Y.) 146; S. C., 4 Wend. 9.

² *Commonwealth v. Crowningshield*, 2 Dana's Abr. 697; *Rex v. Grosvenor*, 2 Star. 54.

yet the public is not to be deprived of them by the erection of a wharf for mere private convenience."

SEC. 614. On fresh-water navigable streams, where the riparian owner owns to the center of the stream, or where his title extends to low-water mark, the riparian owner may erect wharves, docks, piers, slips,¹ or even maintain a floating dock, provided he does not thereby *materially* interfere with the free navigation of the stream.² He has a property in the stream by virtue of his ownership of the *alveus* thereof, and the State cannot pursue him for a *purpresture* so long as he confines his use of the same to the part of the bed of the stream covered by his title, nor for a nuisance, unless he encroaches upon the stream to such an extent as to prevent the free passage of the species of craft which can navigate it.³ In a case decided in Massachusetts as early as 1796 this doctrine was recognized. In order to a proper understanding of the case, it should be stated that in that State under the colonial ordinance of 1641 an owner of land upon the sea or tidal streams is made a riparian proprietor and holds the *alveus* thereof to a distance of one hundred rods from high-water mark. His right therein, however, was qualified to a use of the interest in the bed of the stream that did not conflict with the public use of the stream for the purposes of navigation. This ordinance was afterward repealed, but *Angell* says in his work on *Tide Waters*, p. 225, that "from that time to the present, an *usage* has prevailed, which now has the force of a local common law, that the owner of land bounded on the sea or salt-water shall hold to low-water mark as provided by the terms of the ordinance." In the case referred to, the defendant was indicted for obstructing a navigable river by the erection of a wharf, and it appeared that a part of the wharf was *below* low-water mark. He contended that, although his wharf extended beyond low-water mark, yet it could not be

¹ *Bainbridge v. Sherlock*, 29 Ind. 324; *Moore v. Board of Commissioners*, 32 How. Pr. (N. Y.) 184.

² *Wetmore v. Atlantic White Lead Co.*, 37 Barb. (N. Y.) 70; *Rogers v. Barker*, 31 id. 447; *Hart v. Mayor, etc.*, 9 Wend. (N. Y.) 521.

³ *Hogg v. Zanesville Canal Co.*, *Wright* (Ohio), 139; *Jones v. Pettibone*, 2 Wis. 308; *Yates v. Judd*, 18

id. 118; *Walker v. Shepardson*, 4 id. 384; *Lorman v. Benson*, 8 Mich. 18. This doctrine is recognized in the United States courts, and is applied to such structures as are erected under authority from the State. *Packet Co. v. Peoria Bridge Asso.*, 38 Ill. 467; *United States v. R. R. Bridge Co.*, 6 McLean (U. S.), 517; *Wilson v. Blackbird, etc.*, 2 Pet. (U. S.) 245.

regarded as a nuisance and an injury to the public, and that, as the channel alleged to be obstructed only led into a small dock, inclosed with wharves of private persons, the injury complained of, if any, could only be made the ground of a civil remedy. The court held, however, that being an arm of the sea, its obstruction was an indictable offense, but charged the jury that it was no obstruction, and consequently not a nuisance, if a sufficient passage way was left for the public. The jury having viewed the premises found that the wharf was an obstruction to the extent of that portion of it which extended into the channel.¹

SEC. 615. The ownership of the alveus of the stream, whether to the center thereof or only to low-water mark, carries with it the exclusive right to use the shore and bed of the stream for every purpose for which it can be used, not inconsistent with the public easement therein. It gives the exclusive right to build wharves, docks and slips opposite the banks, and even the State cannot divest the owner of the banks of this right, without proper compensation.² But the right to use the stream by the riparian owner, or to make erections of any kind therein, is confined to such a use and such erections as shall not hinder or obstruct navigation. If erections are made that interfere with *free* passage upon the stream, they are public nuisances.³ The rights of the riparian owner on this class of streams are in the nature of a *natural franchise*, but it is not a franchise that warrants the use

¹ See also *Commonwealth v. Wright*, 3 Am. Jurist, 185; *Thach. Cr. Ca.* 115; *Commonwealth v. John*, 3 id. 190; *Gray v. Bartlett*, 20 Pick. (Mass.) 186. In *Austin v. Carter*, 1 Mass. 231, it was held that the riparian owner had a right to exclude the public entirely from all the waters covered by his title. See also *Barker v. Bates*, 19 Pick. (Mass.) 255; *Com. v. Charlestown*, 1 id. 180. But this doctrine is not now held in Massachusetts, and a riparian owner who should now attempt to exclude the public from the use of waters, in fact navigable, even though only for small pleasure boats, would be held chargeable for a nuisance. *Attorney-General v. Wood*, 108 Mass. 36; 11 Am. Rep. 380.

² *Yates v. Milwaukie*, 10 Wall. (U. S.)

497; *Yates v. Judd*, 18 Wis. 118; *Walker v. Shepardson*, 4 id. 486; *Bainbridge v. Sherlock*, 29 Ind. 354.

³ *Walker v. Shepardson*, 2 Wis. 384; *Dutton v. Strong*, 1 Bl. (U. S.) 23. But the State may regulate the erection of wharves on all such streams. *Id.* But in Wisconsin it is held that dock lines cannot be established on such streams, without compensation. *Walker v. Shepardson*, 4 Wis. 486. So in Ohio, *Walker v. Board of Public Works*, 16 Ohio St. 540, it was held that the legislature cannot, by declaring a river navigable, deprive a riparian owner of his rights in the stream without compensation. See, also, *Morgan v. King*, 35 N. Y. 454; *Del. & Hud. Canal Co. v. Lawrence*, 9 N. Y. S. C. 164.

of the stream by him, that essentially interferes with free navigation. But the right is construed to cover the privilege of erecting wharves and other aids to commerce, that do not *materially* impair the navigability of the stream, and there can be no good reason why the same rule should not prevail as to such erections, as is held by the federal courts in reference to erections made upon tidal and inter-state streams, by authority from the State. That is, that erections made by the riparian owner in aid of commerce, and for the convenience of navigation, will not be held public nuisances, unless they *materially* interfere with navigation, and that in determining the question, the relative convenience and inconvenience arising from the structure will be taken into account.¹

SEC. 616. In the case of *Delaware & Hudson Canal Co. v. Lawrence*, 9 Sup. Ct. (N. Y.) 163, the plaintiffs brought an action against the defendant for erecting a wharf on Rondout creek, a tributary of the Hudson river, and in which the tide ebbed and flowed beyond the point where the wharf was erected. It appeared that the plaintiffs were largely engaged in navigation on the creek in question, in the transportation of coal and other merchandise, and employed a large number of boats in the business. The defendant was the owner of a tract of land bordering on the creek, and held a patent from the State conveying him to low-water mark, and beyond the outer limits of his wharf. It was found by the referee that the wharf would be an obstruction to navigation, and upon these facts the plaintiff claimed that the defendant should be enjoined from the erection and completion of the wharf. It will be observed that it was not found that the wharf would be a *material* obstruction to navigation, or that it would be more than a simple inconvenience thereto.

¹ *Devoe v. Penrose Ferry Bridge Co.*, 2 Am. Law Reg. (U. S.) 79. In *The Passaic Bridges*, 3 Wall. (U. S.) 782, it was held that a bridge erected over a navigable stream subject to federal jurisdiction, under authority of the State, could not be regarded as a nuisance, when the benefit to the public therefrom is equal to the obstruction, provided room is left for proper navigation.

But, when the obstruction is actually shown to be a nuisance, no calculations or comparisons will be made between the injuries and benefits produced thereby. *Works v. Junction R. R. Co.*, 5 McLean (U. S.), 425; *Mississippi & Missouri R. R. Co. v. Ward*, 2 Bl. (U. S.) 485; *Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. (U. S.) 519

The cause was heard at General Term and the court held that the plaintiff having derived his title from the State, and being a *riparian owner* by virtue of his ownership of the shore, between high and low-water mark, was thereby vested with a franchise which justified and protected him in the erection of a wharf opposite his banks, which did not *materially* interfere with the navigation of the creek, and that the simple finding by the referee that the wharf would be an obstruction, without the further finding that the obstruction would be *material*, would not justify an injunction restraining the defendant from maintaining or completing his wharf. The judgment was affirmed in the Court of Appeals, but it is somewhat difficult to believe that that court adopted, or intended to adopt the doctrine laid down by POTTER, J., in his opinion, in its full extent, if it was intended by him to give it application upon tidal and non-tidal streams, without reference to the question of riparian ownership, particularly when such a position would operate directly to overthrow the rule adopted in the case of *People v. Vanderbilt*, 26 N. Y. 287. But I do not apprehend that the learned judge intended to hold that such a rule prevails in reference to unauthorized obstructions. Stripped of some of the *dicta* engrafted into his opinion by POTTER, J., which is calculated to mislead, and some errors that doubtless arose from a misconception of the doctrine in reference to purprestures, which were probably gathered from the opinion in *People v. Vanderbilt*, where the court did not define, although it doubtless had in view, the distinction between an ordinary purpresture and a purpresture *injurious to a port*, the judgment in the case can be supported, consistently with authority, but, when it is attempted to give the doctrine announced, general application, it is clearly in conflict with the best considered cases of the courts, both of this country and England. In this case, the defendant, by his grant from the State, was made a riparian owner, and was vested with all the powers and privileges of a riparian owner upon a fresh-water stream, whose title covers the bed of the stream. By virtue of that ownership he clearly had the right to erect a wharf in front of his lands *upon his own soil*, that did not *materially* interfere

with navigation,' but independent of the grant, it is clear that he could not have erected a wharf there, whether it *materially* interfered with navigation or not. The slightest encroachment would have been a *purpresture*, and, according to the doctrine of *People v. Vanderbilt*, a public nuisance, *as being an injury to the port*. But it would seem that there was still another ground, in the case, which the court regarded as fatal to the plaintiff's recovery, and that is, that the case did not show that the plaintiff sustained any such *special* or *particular* damage, as entitled him to maintain a private action for relief. The damage found by the referee was only such inconvenience as every person navigating the stream was subjected to, and the fact that they were *largely* engaged in the navigation of the stream, placed them in no better position, than as though they were simply the owners of a single vessel, unless they show that they sustained some *special* damage therefrom, that made this *public* nuisance a *private* nuisance as to them.²

¹ Walker v. Shepardson, 4 Wis. 486; Mariner v. Schultes, 13 id. 692; Harrington v. Edwards, 17 id. 586; Chapman v. R. R. Co., 33 id. 629; Yates v. Judd, 18 id. 118; R. R. Co. v. Schurmier, 10 Minn. 82; Bainbridge v. Sherlock, 29 Ind. 364; Cox v. State, 3 Blackf. (Ind.) 193; Yates v. Milwaukie, 10 Wall. (U.S.) 497; Lorman v. Benson, 8 Mich. 437. The rule is, in reference to streams over which the title of the riparian owner extends to the center of the stream, that he may make any use of the stream not inconsistent with, or operating as an obstruction. Middleton v. Flat River Booming Co., 27 Mich. 533; Dutton v. Strong, 1 Black (U. S.), 31.

In Rice v. Ruddiman, 10 Mich. 121, MANNING, J., says: "Wharves and piers are almost as necessary to navigation, as vessels and shipyards. * * It seems to me on principle, as well as reason, that the owner of the shore has the right to use the adjacent bed of the lake for that purpose." MARTIN, J., in the same case, says: "The riparian owner has the right to construct wharves, buildings and other improvements in front of his land, so long as the public servitude is not thereby impaired." Not only have the riparian owners a right to erect wharves, but they have a right to have the access thereto kept open. Irwin

v. Dixon, 9 How. (U. S.) 33, and any person who interferes therewith, by mooring his boat unreasonably opposite thereto, is liable for the injury. Bainbridge v. Sherlock, 29 Ind. 364; Rice v. Ruddiman, ante. A wharf boat is not necessarily a nuisance; whether it is or not, is a question of fact, and, even if it is, it cannot be injured or removed by any one navigating the stream, unless it operates as an actual hindrance to him. Bainbridge v. Sherlock, ante. All actual hindrances or obstructions to navigation are public nuisances. Williams v. Wilcox, 8 Ad. & El. 314; Knox v. Chaloner, 42 Me. 150.

² Harvard College v. Stearns, 15 Gray (Mass.), 1; see chapter on "Private Actions for Public Nuisances;" Atkinson v. Philadelphia & Trenton R. R. Co., 14 Haz. Pa. Reg. 10. But if the plaintiffs were hindered and delayed in their business, and suffered pecuniary loss therefrom, there would seem to be no good reason why they might not be said to have a right to maintain the action. Powers v. Irish, 23 Mich. 274; Yolo v. Sacramento, 36 Cal. 342. A plaintiff seeking to enjoin a public nuisance from which he has sustained special damage, is, though nominally acting on his own account, treated as acting in behalf of all who may be injured thereby. Mississippi & Missouri R. R. Co. v. Ward, 2 Black (U.S.), 485

SEC. 617. The question of nuisance arising from an authorized obstruction is always a question of fact to be determined by the jury in each case, under proper instructions from the court,¹ and no definite rule can be given by which to determine whether or not an obstruction in a given case is a *material* obstruction. This must necessarily depend upon a variety of questions. First, Whether the person making the obstruction is a riparian owner. Second, Whether it interferes with the free passage of boats. Third, Whether it produces inconvenience to navigation. Fourth, Whether it impairs the safety of navigation. Fifth, Whether it deprives vessels or boats of any material advantage, such as shelter, tacking, etc. Mere inconvenience, produced by the erection, is not enough; it must be of such a character as to amount to a material obstacle thereto, either by narrowing the channel or depriving navigators of some advantage that existed before, or by impairing the safety of vessels while skillfully navigating the stream, and such as is not necessarily incident to the exercise of the authority at all.²

The rule is, that in order to entitle a person to maintain a bill for an injunction to restrain a public nuisance, he must sustain *some* special damage, so that the obstruction may fairly be said to be a *private* nuisance as to him, and it would seem that any actual pecuniary injury is sufficient, and, if the nuisance is continuous, and likely to be constantly recurring, an injunction will generally be granted. Works v. Junction R.R. Co., 5 McLean (U. S.), 425; Pennsylvania v. Wheeling, etc., Bridge Co., 13 How. (U.S.) 519; R.R. Co. v. Ward, 2 Black (U.S.), 485; Spooner v. McConnell, 1 McLean (U. S.), 338; Irwin v. Dixon, 9 How. (U. S.) 10; Georgetown v. Canal Co., 12 Peters (U. S.), 91. It is only by virtue of special and individual injuries, that a court can give relief to a private person against a public nuisance. Illinois & St. Louis R.R. & Canal Co. v. St. Louis, 5 Chicago Leg. News, 49; see Parrish v. Stephens, 1 Oregon, 73.

In Jolly v. Terre Haute Drawbridge Co., 6 McLean (U.S.), 237, the plaintiff's vessel was actually injured by the obstruction, while being skillfully navigated. In Columbus Ins. Co. v. Peoria Bridge Association, 6 id. 70, DRUMMOND, J., laid down the rule that no recovery can be had for delay and risk that is

inseparable from that which is covered by authority to erect the obstruction.

In Dobson v. Blackmore, 9 Ad. & El. (N. S.) 991, it was held that the plaintiff was entitled to recover for injuries sustained by a floating wharf, so located upon the river as to prevent access to the plaintiff's premises. The *special* injury alleged, was the extra expense incurred by the plaintiff, and time consumed in going a longer route. The court held this such particular damage as made the nuisance private as to the plaintiff. In Rose v. Miles, 4 M. & S. 101, the defendant moored his barges in such a manner as to cut off access to plaintiff's premises, and he was compelled to carry his goods around it, Lord ELLENBOROUGH said, "If a man's time, or his money are worth any thing, it seems to me that the plaintiff has sustained particular damage. In Rose v. Groves, 5 M. & G. 513, the plaintiff was held entitled to recover for loss of custom as an innkeeper by reason of the placing of timbers in the stream so as to prevent access to his inn.

¹The Passaic Bridges, 3 Wall. (U.S.) 782; Morgan v. King, 18 Barb. (N. Y.) 277; Del. & Hud. Canal Co. v. Lawrence, 9 N. Y. S. C. 163.

²Parrish v. Stevens, 1 Oregon, 72.

But when an obstruction is *unauthorized*, as a wharf erected between high and low-water mark on a *tidal* stream, or upon a fresh-water navigable stream, when the owner of the banks is restricted to high-water mark, it is a public nuisance, whether it materially obstructs navigation or not, the question is, whether it is *any* obstruction, and the question of relative benefit will not be considered. It is a nuisance *per se*.¹

In a case recently decided in the English Court of Chancery Appeals, *Attorney-General v. Terry*, 9 L. R. Ch. App. 423, the court again disapproved of the doctrine of the case of *Rex v. Russell*, 6 B. & C. 566, and held that, where a wharf owner drove piles into the bed of a river, extending his wharf so as to occupy three feet out of a breadth of about 60 feet available for navigation, it was a nuisance, and the court in disposing of the question refused to consider the benefit of the extension to his trade, and held it a nuisance, even though no actual obstruction to navigation was occasioned.

A similar doctrine was recently announced in the case of *Atlee v. The N. W. Packet Co.*, in the United States Sup. Ct., Alb. Law Jour., Vol. 10, p. 156.

¹ *People v. Vanderbilt*, 26 N. Y. 287; *Rex v. Ward*, 4 Ad. & El. 384; *Attorney-General v. Richards*, 2 Ansth. 603; *Bainbridge v. Sherlock*, 29 Ind. 364. In *City of Bristol v. Morgan*, cited 2 Ansth. 608, the defendant erected houses on the banks of the *Avon* so as to straighten the river, and this was held to be a purpresture, and the houses were abated as such under an order of the court. In a similar case, *The Town of Newcastle v. Johnson*, a similar doctrine was held, 2 Ansth. 608. Opinion of MARTIN, C. J., in *Rice v. Ruddiman*, 10 Mich. 125, referred to and approved by GREGORY, C. J., in *Bainbridge v. Sherlock*, 29 Ind. 364; *Gold v. Carter*, 9 Humph. (Tenn.) 369; *The People v. St. Louis*, 5 Gilman (Ill.), 351; *Selman v. Wolfe*, 27 Texas, 68; *Garey v. Ellis*, 1 Cush. (Mass.) 306; *Pennsylvania v. Wheeling Bridge Co.*, 13 How. (U. S.) 519; *Columbus Ins. Co. v. Peoria Bridge Association*, 6 McLean (U. S.), 209; *Gunter v. Gearey*, 1 Cal. 462; *Butler v. King*, 6 Md. 165; *Laughlin v. Lamasco*, id. 223; *Atlee v. Packet Co.*, U. S. S. C. March, 1873, Alb. Law Jour. March 5th; *Geigor v. Filor*, 8 Fla. 325; *Naglee v. Ingersoll*, 7 Barr. (Penn.) 185; *Newark Plank-road Co. v. Elmer*, 1 Stockt. (N. J.) 754; *Cox v. The State*, 3 Blackf. (Ind.) 193; *Barnes v. Racine*, 4 Wis. 454; *Reynolds v. Clark*, 1 Pittsburgh, 9.

CHAPTER EIGHTEENTH.

PRIVATE ACTIONS FOR INJURIES FROM PUBLIC NUISANCES.

- SEC 618. Special and particular damage necessary to uphold private action.
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620. Slight damage sufficient.
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622. *Paine v. Partrich*.
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624. *Morley v. Pragnall*.
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626. Instances of special injury.
627. Loss resulting from delay by obstruction, sufficient.
628. Obstructing a common watering place.
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630. Cutting off access to premises sufficient.
631. Preventing passage over navigable stream resulting in special loss.
632. Mere obstruction not sufficient. Instances of special damage.
633. Loss of time and labor in removing obstruction, sufficient.
634. Loss of trade by reason of obstruction.
635. Cutting off approach to wharf on public river.
636. Number injured, of no importance.
637. *Houck v. Waucher*.
638. Turning one out of his route, when sufficient.
639. *Powers v. Irish*.
640. *Cook v. Corporation of Bath*.
641. Can be no recovery for the common injury.
642. Common injury defined.
643. Same continued.
644. Discomfort resulting from noxious trades, when special injury.
645. Bawdy house, establishment of, when actionable.
646. Sale of unwholesome food.
647. A nuisance may be both public and private.
648. *Attorney-General v. Earl of Lonsdale*.
649. *Sampson v. Smith*.
650. *Mills v. Hall*.
651. *Francis v. Schoellkopf*.
652. *Soltan v. De Held*.
653. Instances of special damage.
654. The *gist* of actions for injuries from public nuisances, is the special damage which must be alleged and proved.
655. Actions sustained to support private rights
656. Injury to a vested right, sufficient.

- SEC. 657. Distinction between public and private rights.
658. Injuries to private rights, always actionable.
659. Same continued.
660. Simple obstruction of highway without special injury, actionable in certain cases.
661. Actions upheld, to prevent imposition of servitudes upon estates.
662. When private actions will be upheld for protection of private rights.
663. *Wesson v. Washburn Iron Co.*
664. Best method of illustrating the doctrine of the courts.
665. *Seeley v. Bishop.*
666. *O'Brien v. Norwich & Worcester R. R. Co.*
667. Why relief was denied in this case.
668. *Higbee v. Camden & Amboy R. R. Co.*
669. *Stetson v. Faxon.*
670. Any obstruction of or injury to a private right is actionable.
671. Personal injury sufficient.
672. Special instances for injuries from obstruction of highway.
673. Same continued.
674. Delay in journey, when actionable.
675. When party has private right in public way.
676. Personal injury always actionable when person injured is free from fault.

SEC. 618. It is often a difficult question to determine when a person can maintain an action for injuries received from a common nuisance. The rule is well established that no person can maintain an action unless he sustains a special damage therefrom, different from that sustained by the rest of the public. Or, to state the proposition in the form in which it is usually stated in the cases, "no person can maintain an action for damages from a common nuisance, where the injury and damage are common to all."¹

SEC. 619. The reason for this rule, as given in the early cases, is, that the exercise of such a right would lead to a great multiplicity of suits, and to endless and interminable litigation."²

Therefore the courts very wisely have unswervingly adhered to the rule, that an individual, in order to be entitled to a recovery for injuries sustained from a public nuisance, must make out a clear case of special damages to himself, apart from the rest of

¹ *Coke's Inst.* 560; *Williams' Case*, 289; *Lansing v. Smith*, 8 Cow. (N. Y. 152).
² *Coke*, 72; *Paine v. Patrich*, 3 Mod. 152.

² *1 Coke's Inst.* 56, note a.

the public, and of a different character, so that they cannot fairly be said to be a part of the common injury resulting therefrom.¹

It is not enough that he has sustained more damage than another; it must be of a different character, special, and apart from that which the public in general sustain,² and not such as is common to every person who exercises the right that is injured.³

SEC. 620. Lord COKE lays down the doctrine in vol. 1, p. 56, note *a*, of his Institutes thus: "If a man be disturbed to go over a common highway, or if a ditch be made across it so that he cannot go, yet he shall not have an action upon his case; and this the law provided to prevent multiplicity of suits; for if any one man might have an action, all men might have the like, unless any man hath a particular damage; as, if he and his horse fall into the ditch whereby he received hurt and loss, then for this special damage, which is not common to all, he shall have an action upon the case." It will be perceived that the learned author confines the class of injuries, for which a recovery may be had for a nuisance to a highway, to those which are of a direct and personal character, resulting either from a direct injury to the person or to property. This was the rule as held at the time when he wrote; but it was soon after relaxed, and made to cover any special or particular damage, apart from those that are incident to, and suffered by all the public, whether such damage is direct or only consequential.⁴

No person can maintain an action for a mere obstruction of a

¹ *Iveson v. Moore*, Ld. Raym. 486; 12 Mod. 263; *Morley v. Pragnall*, Cro. Car. 510; *Fineux v. Hovenden*, Cro. Eliz. 664; *Hart v. Bassett*, T. Jones, 156; *Chichester v. Lethbridge*, Willes, 71; *Herbert v. Groves*, 1 Esp. N. P. Cas. 148; *Rose v. Miles*, 4 M. & S. 101; *Greasily v. Codling*, 2 Bing. 263; *Hughes v. Heiser*, 1 Binn. (Penn.) 463; *Pierce v. Dart*, 7 Cow. 607.

² *Lansing v. Smith*, 8 Cow. (N. Y.) 153; *Pierce v. Dart*, 7 id. 609.

³ 1 Coke's Inst. 56, note *a*; *Williams' Case*, 5 Coke, 72; *City of Georgetown v. Alexandria Canal Co.*, 12 Pet. (U. S.) 91.

⁴ *Williams' Case*, 5 Coke, 72; *Robert*

Mary's Case, 9 id. 112; *Hart v. Bassett*, T. Jones, 156; *Chichester v. Lethbridge*, Willes, 71; *Iveson v. Moore*, Ld. Raym. 486; *Baxter v. Winooski*, 28 Vt. 142; *Yolo v. Sacramento*, 36 Cal. 193; *Burrows v. Pixley*, 1 Root (Conn.), 362; *Ottawa Gas-light Co. v. Thompson*, 37 Ill. 598; *Bruning v. N. O. Canal and Banking Co.*, 12 La. 541; *Mayor v. Marreoth*, 9 Md. 160; *Stetson v. Faxon*, 19 Pick. (Mass.) 147; *Lansing v. Smith*, 4 Wend. (N. Y.) 9; *Hughes v. Heisir*, 1 Binn. (Penn.) 463; *Hughes v. R. R. Co.*, 2 R. I. 493; *Cole v. Sprowl*, 35 Me. 161; *Smith v. McConathy*, 11 Mo. 517; *Seeley v. Bishop*, 19 Conn. 128; *Low v. Knowlton*, 26 Me. 128

highway, because the placing of the obstruction there is unlawful, or because it operates to put him to some inconvenience, but the rule was well established in the case of *Hart v. Bassett*, that if a person sustained any, even slight, special damage therefrom, as, in that case, being compelled to carry his tithes a more circuitous route, a recovery for the special injury might be had. In *Iveson v. Moore*, 1 Ld. Raym. 186, the court held that such an action would lie, and the reason for the opinion, as taken from the manuscript of WILLES, J., found in a note to *Chichester v. Lethbridge*, Willes, 74, is thus stated: "But the court (King's Bench) being divided, the matter was reserved for the rest of the judges, who all agreed to the opinion of TURTON, J., and GOULD, J., that the action lay. The reason that the judges went upon, was principally this, that it sufficiently appeared that the plaintiff must, and did necessarily suffer a special damage, more than the rest of the king's subjects, by the obstruction of this way, by which it must be understood, without any allegation of loss of customers, that the plaintiff did suffer particularly in reference to his trade, by the plaintiff's wrong." The justice of this rule is apparent, and that would indeed be a harsh doctrine, that would prevent a recovery for actual injuries resulting from the obstruction of a highway, simply because others were obstructed also, and thus a multitude of actions might be brought.

SEC. 621. The rule, as existing at this time, may be stated to be, that where a person sustains a special damage peculiar to himself, either to his person or property, direct or consequential, from a public nuisance, whether arising from the obstruction of a highway or from any cause, he shall have his remedy therefor.* To illustrate this rule, and give the reader a correct understanding of its true force and application, it will be profitable to take up and mark the modifications which the law, in this respect, has undergone since Lord COKE's time. *Williams' Case*, 5 Coke, 72, was an action brought by the plaintiff against the Vicar of

¹ *Ross v. Butler*, 4 C. E. Green (N. J.), 294; *Wesson v. Washburn Iron Co.*, 13 Allen (Mass.), 95; *Haskell v. New Bedford*, 108 Mass. 216; *Soltan v. De Held*, 9 Eng. Law and Eq. 20; *Ottawa Gas-light Co. v. Thompson*, 39 Ill. 598.

² *Robert Mary's Case*, 9 Coke, 112; *Hobson v. Todd*, 4 T. R. 73; *Butterfield v. Forster*, 11 East, 60; *Flower v. Adams*, 2 Taunt. 314; *Pindar v. Wadsworth*, 2 East, 155; Com. Dig., Action on the case, B. 8; *Dudley v. Kennedy*, 63 Me. 465; *Clark v. Peckham*, 10 R. I. 35; *Greene v. Nunne-macher*, 36 Wis. 50.

Alderbury for not celebrating divine service in a certain chapel in the plaintiff's manor. The defendant was found guilty upon the trial at Assizes, and a motion in arrest of judgment was filed, and upon hearing, it was held by the whole court that the judgment could not be sustained in favor of the plaintiff, because the chapel was not private to himself and his family, but public and common to all the tenants of the same manor, which may be many, and if the lord could maintain an action, so could each of his tenants, and so there would be many actions for one default. But if the chapel had been private to the lord and his family, then he might have maintained his action. "But," says the court, "if any particular person afterward, by the same nuisance done, has more particular damage than any other, then, for that particular injury, he shall have his particular action, and for common nuisances that are equal to all the king's liege people, the common law has appointed other courts for the correction and reforming of them, to wit, terns, leets," etc.

Thus in this case the doctrine was recognized, although not defined, that a person sustaining special and particular damage from a common nuisance might have an action therefor.

SEC. 622. In *Paine v. Partrich et al.*, 3 Mod. 289, the plaintiff brought an action against the defendant for being hindered from going over a ferry which the defendants were bound to keep. The only injury or damage which the plaintiff set up in his declaration was the loss of his passage. The defendant answered that he had built a bridge in place of the ferry. But the court held on demurrer that the owner could not let down the ferry and put up a bridge without a license, and that the custom was good, in the nature of an easement, but that the custom consisted not in the right to *pass*, for that was common to all the king's subjects, but in the right to pass toll free. That therefore the plaintiff could not maintain an action for not passing, for so any other subject might bring an action which would be endless and infinite. "*Aliter*, if toll had been exacted and paid, and had thus been a special damage, but without a special damage he can only indict or bring information."

SEC. 623. In *Hart v. Bassett*, T. Jones, 156, which was an

action on the case for obstructing a highway, the plaintiff alleged in his declaration, by way of damage, that he farmed the tithes of a certain parish, and was possessed of a certain barn in which he intended to place them, and that by reason of the defendant having obstructed the highway, which was a direct way to his barn, with a ditch and gate, he was forced to carry them around by another and more difficult way.

The court held that the declaration disclosed a sufficient cause of action, because the additional labor of the plaintiff's servants and cattle was a particular damage.

SEC. 624. In *Morley v. Pragnall*, Cro. Car. 510, which was an action against the defendant for erecting and working a tallow furnace near the plaintiff's inn, to the annoyance of his guests, and in consequence of which they left his inn, and the plaintiff's family were rendered unhealthful, a verdict was rendered for the plaintiff, and upon a motion in arrest of judgment no question was made but that this was a sufficient special damage; but the defendant's counsel predicated his objection to the verdict upon the ground that the trade was needful, and might therefore be conducted anywhere. The verdict, however, was sustained, the court holding that the special damage was sufficiently proved.

SEC. 625. In *Chichester v. Lethbridge*, Willes, 71, the plaintiff brought an action against the defendant for obstructing a highway, and alleged as a special ground of action that he had attempted several times to pass over the road with his coach, but was prevented from doing so by reason of the obstruction, and that he had several times attempted to remove the obstructions so that he might pass, and had been prevented from doing so by the defendant. The court sustained the verdict for the plaintiff upon the ground that his case was distinguished from that of the public in general, because he had attempted to remove the obstruction and been prevented from doing so by the defendant.

SEC. 626. Thus it will be seen that while the courts adhered unswervingly to the rule that there must be special damage peculiar to the plaintiff, in order to enable him to maintain an action

for damages resulting from a special injury, yet, where special damage was shown they upheld the action, and from cases already noticed we deduce this general doctrine which is still adhered to by the courts, that while a person may not have an action for merely being put to inconvenience, and being delayed in his journey in common with the rest of the public, yet, if by reason of the obstruction he is compelled to go a circuitous route with his goods, whereby he sustains damage by reason of the additional expense incurred by the labor of his servants and cattle, this is a particular damage that will uphold an action for the injury. But if he is merely delayed in his journey or compelled to take a circuitous route, and sustains no special injury, except such as is incident to every person who attempts to pass over the road, no action can be maintained.¹ In the case of the tithes there were two grounds upon which the action could have been sustained. First, the special damage by reason of the additional labor of his servants and cattle; and, secondly, because if he had not gone by the circuitous route and incurred the additional labor and expense, he would have been subjected to an action for not removing the tithes, and this would have been such particular damage as would have given him a right of action. Lord HOLT, in commenting upon this case, in the case of *Iveson v. Moore*, *Ld. Raym.* 486, while he questioned the case upon the particular ground upon which it was placed by the court, admitted that the judgment was in fact correct, because of the liability to damages by delay in the removal of the tithes.

SEC. 627. There can be no question but that if a person by reason of an obstruction in a highway is prevented from performing a contract, or incurs any other legal liability on account of the delay to which he is subjected, that this is such a special injury as will give him a good cause of action. Indeed, this is the doctrine as suggested by Lord HOLT in his comments upon the case above referred to.² But mere inconvenience and delay, such as is incident to all the public attempting to pass, is not of itself suffi-

¹ Woolrych on Ways, 27 H. 8, 27, p. 43. See *Farrelly v. Cincinnati*, 2 Disney (Ohio), 516, where the doctrine of recovery for special damage arising from being obstructed in a highway

and compelled to go by a circuitous route, is ably discussed.

² *Iveson v. Moore*, *Ld. Raym.* 486; *Smith v. Lansing*, 8 Cow. (N. Y.) 161.

cient,¹ but if, in addition to that, any special and particular damage is incurred an action lies.² As if by reason thereof he is subjected to damages by the non-performance of a contract, or in a failure to discharge a legal duty, or sustains actual loss by reason of being unable to reach his destination, by which he is prevented from consummating an advantageous contract.³ So too, if, as in the case of *Chichester v. Lethbridge*, *supra*, he attempts to remove the obstruction and is prevented, or if he actually removes the obstruction, the labor expended therein, however trifling in amount, is within the rule of special injury, and will support an action.⁴

SEC. 628. In *Westbury v. Powell*, a case cited by the court in *Fineux v. Hovenden*, Cro. Eliz. 664, which was an action against the defendant for obstructing a common watering place belonging to the inhabitants of Southwark, of which the plaintiff was a resident, the action was sustained, but the court put their decision upon the ground that it was a private nuisance and that no other remedy could be had. In the case of *Fineux v. Hovenden*, *supra*, in which this case was referred to, it was held that the mere fact that the plaintiff had been prevented from passing over a highway, by reason of obstructions placed therein by the defendant, was not sufficient to entitle him to a recovery, and that no such special damage was shown as would uphold an action for a common nuisance, and that this case was distinguished from the case of *Westbury v. Powell*, because this was a common nuisance and punishable by indictment, while in that case the nuisance was private and could only be redressed *civilly*.

SEC. 629. In *Iveson v. Moore*, Ld. Raym. 486, the plaintiff brought an action against the defendant for obstructing a high-

¹ In *Brown v. Watrous*, 47 Mich. 161, it was held that, where a person pursuing a journey was, by reason of an obstruction, compelled to take a more circuitous route whereby he was delayed, this was such special damage as would enable him to maintain a suit against the person who placed the obstruction there. But this is evidently intended to be restricted to cases where the road leads to the person's premises,

or where he is subjected to special loss in time or otherwise.

² *Baxter v. Winooski Turnpike Co.*, 22 Vt. 414; *Smith v. Lockwood*, 13 Barb. (N. Y. S. C.) 209; *Pittsburgh v. Scott*, 1 Penn. St. 309; *Fineux v. Hovenden*, Cro. Eliz. 664.

³ *Lansing v. Smith*, 8 Cow. (N. Y.) 161.

⁴ *Pierce v. Dart*, 7 Cow. 609; *Lansing v. Wiswall*, 1 Denio (N. Y.), 213.

way leading to the plaintiff's coal mines, whereby he was prevented for the period of two months from passing with his teams and carts for carrying his coals, and whereby customers were prevented from coming to buy his coals by reason of which he lost the profits of his colliery, etc. A verdict was found for the plaintiff and upon a hearing of the case in King's Bench, upon a motion in arrest of judgment, the court were evenly divided upon the question of the plaintiff's right to recover upon the facts alleged in the declaration. Chief Justice HOLT and Justice RAPELY holding that the special damage was not sufficient, and TURTON and GOULD, JJ., holding the special injury sufficient. Upon a subsequent hearing before the judges of the court of Exchequer and Common Pleas, the verdict was unanimously sustained. The judges in King's Bench were also unanimously of the opinion that if it had appeared from the declaration that the plaintiff had lost the opportunity of selling his coals by reason of the obstruction, because purchasers were thereby prevented from going there, and that it fell in price, that was a sufficient special damage which was peculiar to the plaintiff, but they differed upon the question whether, in judgment of law, these facts were sufficiently stated in the declaration. But, as has been previously stated, the court of Exchequer settled the law of this case in favor of the plaintiff, and at the present day, and in the light of the doctrine upon these questions now held by the courts, there can be no question but that it was decided correctly. If an action for damages could not be maintained for such an injury under the facts disclosed in the declaration, it is difficult to conceive how an action could be maintained for any injury from an obstruction of highways, except such as results directly to the person or team of a party. Here was a highway leading to the plaintiffs' coal mines, which were being worked by him, which was obstructed to such an extent as not only to prevent the plaintiffs from hauling their coals, but also so as to prevent persons from going there at all with teams, and which prevented a sale of their coals during that period and a consequent loss of profits. If this was not an injury of a special character to the plaintiffs, a case can hardly be conceived of where special conse-

quential damage could arise from such injuries.¹ Following this case, in 1794, the question again arose before Lord KENYON, in *Hubert v. Groves*, 1 Esp. N. P. Cas. 148, and the doctrine of *Iveson v. Moore* was ignored or seriously questioned. In this case, the plaintiff, who was a coal and timber merchant, brought an action against the defendant for damages sustained by him by reason of obstructions in a highway placed there by the defendant. The declaration stated the fact that the plaintiff was a coal and timber merchant, and had a right, and had been accustomed, to use the highway in question for the purpose of carrying all his goods and things pertaining to his business.

That the defendant had placed upon the highway large quantities of rubbish and earth, by which it was totally obstructed and by reason of which he had lost the use and benefit of the way, and been prevented from enjoying his premises and carrying on his trade in so advantageous a manner as he had a right to do, and by which he was obliged to carry his coals, timber, etc., by a more circuitous and inconvenient route. In all respects, the evidence sustained the allegations in the declaration. But Lord KENYON nonsuited the plaintiff, and the court of King's Bench sustained his judgment, and refused to set aside the nonsuit, upon the ground that it did not appear that the plaintiff had sustained such special damage as entitled him to an action.

This case was decided in direct opposition to the doctrine established in *Hart v. Bassett* and *Iveson v. Moore*, cited *supra*, both of which cases were referred to and relied upon in the argument of the motion to set aside the nonsuit, by ERSKINE, counsel for the plaintiff.

SEC. 630. A similar question came before the English courts a few years later, in *Rose v. Miles*, 4 M. & S. 101, which was an action for damages sustained by the plaintiff by reason of the obstruction of a navigable creek. It was alleged, in the declara-

¹ *Wesson v. Washburn Iron Co.*, 13 Allen (Mass.), 95; *Rose v. Groves*, 1 Law Rep. Q. B. 781; *Frink v. Lawrence*, 20 Conn. 117; *Yolo Co. v. Sacramento*, 36 Cal. 193; *Barnes v. City of Racine*, 4 Wis. 454; *Bigelow v. Hartford Bridge*, 14 Conn. 565; *Seeley v. Bishop*, 19 id. 135; *Georgetown v.*

Alexandria Canal Co., 12 Peters (U. S.), 98; *Crowder v. Tinkler*, 19 Vesey, 616; *Lansing v. Smith*, 4 Wend. 10; *Francis v. Schoellkopf*, 53 N. Y. 152; *Knox v. Mayor, etc.*, 55 Barb. (N. Y. S. C.) 404; *Milbau v. Sharpe*, 27 N. Y. 611.

tion, and so appeared from the evidence upon the trial, that the plaintiff was the owner of several boats and barges, and that they were navigating the creek loaded with merchandise, when the defendant obstructed the passage of the creek by mooring his barge directly across the channel, thus preventing the passage of the plaintiff's boats. The plaintiff, by reason of this obstruction, was compelled to unload his boats and transport the merchandise, with which they were loaded, a great distance by land. A verdict was rendered for the plaintiff in the court of Common Pleas, and the question came before the judges at King's Bench, on a motion in arrest, where the judgment of the lower court was unanimously sustained. Lord ELLENBOROUGH, in commenting upon the question as to whether the plaintiff had shown sufficient special injury to entitle him to recover, said: "If a man's time or his money are worth any thing, the plaintiff has shown a sufficient special damage." This case, in principle, stood upon the same grounds as that of *Hart v. Bassett*, and was a re-affirmance of the doctrine of that case, and was a virtual rejection of the rule advanced in *Hubert v. Groves*. In *Greasley v. Codling*, 2 Bing. 263, the doctrine of *Rose v. Miles* was re-affirmed. In that case the plaintiff was a coal higgler, and was traveling upon the highway in question with three asses laden with coals, when the defendant obstructed his passage by shutting a gate across the same, and keeping it shut, so that he was compelled to return and go to his place of destination by a roundabout and circuitous way, by reason of which he lost much time and was not able to perform as many journeys a day as he could have performed over the highway in question. The court held that this was a sufficient special damage to support the plaintiff's action, and a verdict passed in his favor, which was not disturbed.

SEC. 631. Contemporaneously with these two last-named cases comes the case of *Hughes v. Heiser*, 1 Binn. (Penn.) 463, which was an action to recover for the obstruction of the *Big Schuylkill*, a navigable river, by the erection of a dam, so that the plaintiff's rafts could not pass down the river. The declaration alleged, and the evidence disclosed the facts so to be, that the plaintiff had provided for himself 50,000 feet of pine timber, and made it

into three rafts, with the intent to raft them down the river below the dam; that he did navigate as far as the dam, and that they were entirely prevented by the dam from passing down the river; that the dam was not constructed with a proper slope, as provided by the act authorizing its erection, whereby he was prevented from taking his timber to market, and thereby lost the sale and profits of the same. The court held that the damage was well laid, and was sufficiently special to warrant a recovery.

Sec. 632. It will be noticed that a distinction is made in all these cases between actual present damages and those that rest in contemplation. Thus, in the case of *Hart v. Bassett*, the plaintiff was actually traveling over the road, and was actually obstructed in his passage. So in *Rose v. Miles*, the plaintiff was actually navigating the river, and met the obstruction. In *Greasley v. Codling*, the plaintiff went with his laden asses along the highway, and the gate was shut across his path, obstructing and preventing his passage. So in *Hughes v. Heiser*, the plaintiff built his rafts and floated them down the river, where they actually met the obstruction, and were prevented from passage. It is doubtful whether there could have been a recovery in any of those cases; indeed, it may safely be said that there could have been no recovery in any of them, if the damages had rested merely in contemplation; that is, if, instead of having actually attempted a passage, the parties had severally desisted from so doing, on account of the obstructions. In the latter case, the damages could not be said to have been special, unless they had shown, in the cases of *Hart v. Bassett*, that, by reason of the obstruction, he had been prevented from removing the tithes, and had been actually mulcted in damages in consequence; or, in the case of *Rose v. Miles*, that he had actually lost the sale of his goods, or, having sold them, had been prevented from taking them to the place of delivery in consequence of the obstruction; and, in the case of *Hughes v. Heiser*, if, instead of cutting his timber and sending it down the stream in rafts, he had left it uncut in the forest, because he could not get it to market by reason of the obstruction, there could have been no recovery, because there was no present actual damage, but only such as rested

in contemplation, and such as was common to all similarly situated. Indeed, in the case of *Rose v. Miles*, Lord ELLENBOROUGH said: "The plaintiff had actually commenced his course down the river, and was actually using it when he was obstructed, and his damages did not rest in contemplation." A man cannot stand by idly and claim damages for an obstruction in a highway or navigable river, simply because it *is* obstructed, when he has made no attempt to use the road or river, and has not been actually obstructed,¹ unless he can show that the obstruction was such as not only to obstruct passage, but was of such a character as to render any attempt to pass it useless, and that, by reason thereof, he has actually lost the sale of his goods, or been prevented from performing a contract, or some legal duty, whereby he has sustained actual loss and damage beyond the common damage incident to all.²

SEC. 633. In *Pierce v. Dart*, 7 Cow. (N. Y.) 609, which was an action for a nuisance in building a fence across a highway, it appeared that the plaintiff lived upon the highway in question, and that the obstruction was erected near his house, in consequence of which he claimed that he had sustained a special damage. In addition to this, it also appeared that the plaintiff had several times, when passing over the road with his team, removed the fence which the defendant would as often replace. The witnesses fixed the damages at twenty-five cents as the actual value of the labor required to remove the obstruction. It was insisted, by the defendant, that there could be no recovery, because the obstruction was a common nuisance, and an action for private damages would not lie, but the court said: "In considering the special damage we must lay out of view the fact now set up, that the road was more contiguous, and therefore more beneficial to the plaintiff than to others. He might have been more injured on this account than others, but it is not such an injury as the law will notice.

¹ In *Baxter v. Winooski Turnpike Co.*, 22 Vt. 114, the court held, that no damages can be recovered for an obstruction of a highway simply because the road is insufficient, unless the person claiming damages actually attempted to pass and could not.

² *Baxter v. Winooski Turnpike Co.* 22 Vt. 114; *Hutchinson v. Railroad Co.* 28 id. 142; *Iveson v. Moore, Ltd.* Raym 486; *Rose v. Miles*, 4 M. & S. 101 *Greasley v. Codling*, 2 Bing. 263

"The right of action for an obstruction in a highway can never be determined by the distance at which the party resides from it. All the cases agree that there must be some specific damage to the party before he can sue." But the court upheld the verdict on the ground that he had been actually obstructed in his passage over the road, and had expended time and labor in the removal of the obstruction. The court say: "In the case at bar, the plaintiff was certainly put to some expense. There was a delay, and labor in abating the nuisance, so that he might proceed on the road. True the injury was trivial, and it is not difficult to see that the damages are excessive. But we cannot interfere on that ground, when the action is for a tort." The court expressly adopts the doctrine as laid down in *Rose v. Miles*, and *Hughes v. Heiser*, and holds that delay in a journey is one of the proper elements to be considered in actions of this character, and that when delay is coupled with labor or other damage, however small, that is not necessarily common to all exercising the same right, an action may be sustained.¹

SEC. 634. In the case of *Rose v. Groves*, 12 L. T., N. S., 251, it was held that where the defendant placed beams and spars in a navigable river whereby the access to the plaintiff's inn was obstructed, and many persons that would otherwise have come there and taken refreshments, were hindered from coming, that, even though this was a public nuisance, the plaintiff would be entitled to recover for the special injury he sustained therefrom, and that a general allegation that persons were hindered and prevented from coming to his inn, without specifying particular instances, was good, and set forth sufficient special damage to sustain his action and entitle him to a recovery.

¹ In *Winterbottom v. Lord Derby*, L. R., 2 Exch. 316, it was held where the plaintiff proved no special damage from the obstruction of a highway beyond being delayed several times in passing along the road, and being obliged in common with every one else attempting to use it, either to go by a circuitous route or remove the obstruction, that this was not such special damage as would sustain an action.

In *Blane v. Klumpke*, 29 Cal. 156, it was held that a person whose property is injured by an obstruction in a highway, may have his action to abate the same, but not if his injury is such as is common to others. But it was held that proof that the plaintiff is deprived of free access to his premises by reason of the obstruction, is sufficient to maintain the action.

SEC. 635. In the case of *Frink et al. v. Lawrence*, 20 Conn. 117, which was a proceeding in equity to restrain the defendant from obstructing the approach of vessels to the plaintiff's wharf in New London harbor, it appeared that the plaintiffs were the owners of a lot of land bordering on the waters of the harbor, and had a wharf thereon extending from their land a considerable distance into the harbor. At the outer, or easterly end of the wharf, are projections on each side giving it the form of a —|. This wharf had been built for more than sixty years, and during all that time had been owned and possessed by the plaintiffs and their grantors. The defendant owned land adjoining with a wharf connecting therewith, extending also a considerable distance into the harbor. There was a large and very convenient basin between those two wharves, into which all having occasion to pass with boats or vessels entered. The defendant was about to drive a row of piles from the south-east corner of his land to the north-east end of the plaintiff's wharf, and connect them with ties or caps in such a manner as to entirely obstruct the passage of all boats or vessels from the waters of the harbor to the north side of the plaintiff's wharf, and would thus seriously impair the value of the plaintiff's property. Upon the final hearing it was urged by the defendants that the bill could not be maintained, because the act complained of would be a public nuisance, and could only be redressed by indictment. But the court granted the injunction, and WATTE, J., in delivering the opinion of the court, said: "We have had occasion in several recent cases to decide whether a private individual can maintain a bill in equity for an injunction against a public in navigable waters.¹ And we held that such relief will not be granted unless it appears that the party complaining will sustain a special and particular damage—an injury distinct from that done to the public at large. But on the other hand it was agreed that if such an injury would accrue, the relief would be granted. Indeed, such seems to be the settled rule in equity."²

¹ *Bigelow v. Hartford Bridge Co.*, 14 Conn. 565; *O'Brien v. Norwich & Worcester R. R. Co.*, 17 id. 372; *Seeley v. Bishop*, 19 id. 135; see also *Clark v. Saybrook*, 21 id. 319; *Gilbert v. Mickle*, 4 Sandf. Ch. (N. Y.) 357; *Lexington &*

Ohio R. R. Co. v. Applegate, 8 Dana (Ky.), 299.

² *City of Georgetown v. Alexandria Canal Co.*, 12 Peters (U. S.), 198; *Corn- ing v. Lowerre*, 6 Johns. Ch. (N. Y.) 439; *Crowder v. Tinkler*, 19 Ves. 616;

SEC. 636. In *Lansing v. Smith*, 8 Cow. 151, which was an action to recover damages for placing certain obstructions in the Hudson river, in the city of Albany, whereby the approach to the plaintiff's wharves by vessels was so seriously interfered with as to materially injure, if not quite destroy, the value thereof as a wharf, the court held that this was not such special damage as would entitle the plaintiff to recover, and to add to the surprise that such a decision would naturally inspire, the court says: "Suppose that the basin should render the streets so contiguous to it, in its whole extent unhealthy, so that the houses could not be rented at all, or only at very reduced rates, could every landlord maintain an action for the depreciation of his property and the consequent diminution of his rent? That will hardly be contended, and yet in principle the cases are the same." In the Court of Errors (4 Wend. 10), the judgment was affirmed, but upon other grounds, and the court took occasion to repudiate that portion of the doctrine of the case, that related to the rights of individuals to maintain private actions for injuries arising from public nuisances.

WALWORTH, Ch., said: "If the defendants had erected these temporary bridges and were not authorized to do so, they might be indicted for a common nuisance. But the bridges might also be more injurious to some persons than to others. In such a case, if a person has sustained actual damage, whether direct or consequential, I am not prepared to say he cannot maintain his action therefor. If he sustains no damage but such as the law pronounces every citizen to sustain, because it is a common nuisance, no action will lie. But the opinion I have formed on this point is, that every individual who sustains actual damage from a nuisance may maintain a private action for his own injury, although there may be many others in the same situation. The punishment of the wrong-doer by indictment will not compensate for the individual injury, and a party who has done a criminal act cannot defend himself against a private suit by alleging that

Soltan v. De Held, 9 Eng. L. & Eq. 102; *Knox v. N. Y.*, 55 Barb. (N. Y. S. C.) 404; *Savannah R. R. Co. v. Shiels*, 33 Ga. 601; *Elwell v. Greenwood*, 26 Iowa, 377; *New York v. Baumberger*, 7 Robt. (N. Y. Sup. Ct.) 219; *Sparhawk v. R. R. Co.*, 57 Penn. St. 401; *Sheboygan v. R. R. Co.*, 21 Wis. 667; *Higbee v. R. R. Co.*, 21 N. J. 276.

he has injured many others in the same way, and that he will be ruined if he is compelled to make compensation to all," and Senator S. ALLEN, who delivered a dissenting opinion, also took occasion to repudiate the doctrine of the Supreme Court on this branch of the case in very strong terms. "If it be true," he said, "that if more than one citizen shall be injured in their property or person, no redress can be had from the wrong-doer, except by the tedious and uncertain remedy by indictment, it is time, in my opinion, that the law should be altered."

SEC. 637. In *Houck v. Waucher*, 6 Am. Rep. 332; 34 Md. 265, the plaintiff brought an action against the defendant, Houck, for erecting a fence across a highway and preventing him from removing it, whereby he was compelled to reach his home by taking a long and circuitous route, whereby he lost much time. There was a verdict for the plaintiff at circuit, but the judgment was reversed in the Court of Appeals, upon the ground that this was not such *special* and *peculiar* damage as will uphold an action in favor of an individual for injuries arising from a public nuisance. BARTOL, Ch. J., in delivering the opinion of the court, thus lays down the rule: "The special damage alleged is, that having gone to Frederick City by the highway in question, as he was returning home, he met the obstruction, was withheld by the defendant from removing it, and in consequence '*was obliged to proceed to his farm by a very circuitous route.*'" This is nothing more than a statement of a very particular instance in which the plaintiff suffered an inconvenience which was common to the rest of the community, and is not, in our opinion, such special damage as entitles him to maintain this action. The objection is not to the *form* of the averment, but is *substantial*, going to the very ground and cause of action, which, as was said by TINDAL, Ch. J., in *Wilkes v. Hungerford Market Co.*, 2 Bing. (N. C.) 281, exists only where the plaintiff has suffered some peculiar injury, beyond that which affects the public at large.¹

¹ *Smith v. Lockwood*, 13 Barb. (N.Y. S. C.) 209; *Corning v. Lowerre*, 6 Johns. Ch. (N. Y.) 439; *Pierce v. Dart*, 7 Cow. (N. Y.) 609; *Davis v. The Mayor*, 14 N. Y. 526; *Milhau v. Sharp*, 27 id. 618; *Knox v. The Mayor, etc.*, 55 Barb. (N. Y. S. C.) 406; *Catlin v. Valentine*, 9 Paige's Ch. (N. Y.) 575. The question was not raised in this case, but it is quite evident that the nuisance was public. *Francis v. Schoellkopf*, 53 N. Y. 152. See also *Barnes v. City of*

All the authorities agree that, to support the action, the damage must be different, not merely in degree, but different in kind from that suffered in common; hence it has been well settled, that though the plaintiff may suffer more inconvenience than others from the obstruction, by reason of his proximity to the highway, that will not entitle him to maintain an action.¹ In this case there was no averment that the highway in question was the only highway by which he could reach his premises, nor that he had sustained any other damage than that of being delayed and compelled to take a circuitous route."

SEC. 638. In *Brown v. Watrous*, 47 Me. 161, it was held that a person returning home over a highway, which has been obstructed by another, whereby he is compelled to take a more circuitous route, is entitled to recover the damage thus sustained, and the fact that the road led to his house, sustains the special claim for damages.

SEC. 639. In *Powers v. Irish*, 23 Mich. 429, the plaintiff, in passing over a navigable stream with rafts of lumber, was detained by the defendant's dam, so that he lost the sale of his lumber at such prices as he otherwise would have obtained. He recovered a verdict of \$4,000, the court holding that although the nuisance was public, yet the detention of a person passing over it with his property was such special damage as would uphold an action.

SEC. 640. In *Cook v. Corporation of Bath*, 6 L. R. Eq. Ca. 177, an action was upheld in favor of the plaintiff and an injunction granted to protect his special rights, arising from the obstruction of a highway, by plaintiff placing buildings therein so as to cut off access to the plaintiff's premises. It was objected on the trial that this being a *public* nuisance, the action could not be maintained by the plaintiff, but that the Attorney-General

Racine, 4 Wis. 454; *Mayor v. Murrott*, 9 Ired. 160; *Ross v. Butler*, 4 Green (N. J.), 294; *Yolo v. Sacramento*, 36 Cal. 193; *Ottawa Gas-Light Co. v. Thompson*, 39 Ill. 598; *Cole v. Sproul*, 35 Me. 161; *Hughes v. R. R. Co.*, 2 R.I. 493; *Smith v. Smith*, 2 Pick. (Mass.) 691; *Wesson v. Washburn Iron Co.*, 13

Allen (Mass.), 95; *Soltan v. De Held*, 9 Eng. Law & Eq. 102; *Rose v. Groves* 13 L. J., ante.

¹ *Stetson v. Faxon*, 19 Pick. (Mass.) 147; *Thayer v. Boston*, id. 511; *Quincy Canal v. Newcomb*, 7 Met. (Mass.) 283; but see, contra, *Brown v. Watrous*, 47 Mich. 161.

should have been made a party. MALINS, V. C., said, "In this case I am of opinion that there has been a wholly unjustifiable stopping up of a public or private way, it matters not which; if it is a *public* way, the Attorney-General might have sued in respect of the *public* nuisance, and the plaintiff may also sue in respect to his *individual* injury, and, therefore, in any view of the evidence, the plaintiff is entitled to maintain his action.

SEC. 641. I have given extracts thus far only from cases arising from obstructions of highways and navigable rivers, and they may be regarded as illustrating the doctrine of the courts in reference to all classes of public nuisances.

The general doctrine is, and may be regarded as the well-settled rule in courts of law and equity, both in this country and England, that for damages arising from a purely public nuisance, that is, one whose effects are common to all, producing no special or particular damage to one, as distinguished from the rest of the public, there can be no redress except by indictment or information in equity at the suit of the Attorney-General or other proper public officer.

SEC. 642. By common injury, is meant an injury of the same kind and character, and such as naturally and necessarily arises from a given cause, but not necessarily similar in degree, or equal in amount.

If the injury is the same in kind to all, it is a common injury, although one may actually be injured or damaged more than another. To illustrate, we will take the case of a slaughter-house erected upon a public street.

To all who come within the sphere of its operation or effects, it is a nuisance, and offends the senses by its noxious smells. It is a common nuisance in such a locality, and in its general effects produces a common injury. But to those living upon the street and within its immediate sphere, it is both a common and a private nuisance. Common in its general effects, but private in its special effects upon those living there.¹ To the public gener-

¹ Soltan v. De Held, 9 Eng. Law & Eq. 102; Wesson v. Washburn Iron Co., 13 Allen (Mass.), 95.

ally it produces no injury except such as is common to all; but to those owning property in its neighborhood, or residing there, it produces a special injury, in that it detracts from the enjoyment of their habitations, produces intolerable physical discomfort, and diminishes the value of their premises for the purposes to which they have been devoted.¹ Therefore, while those residing beyond its sphere and owning no property there that is impaired in value, can have no private remedy, either at law or in equity; yet, those who live in the neighborhood, or who own property there that is impaired in value by reason of the nuisance, *may* have their private actions to recover their special damage, or protect their special interests.² The degree of damages which each sustains, varies according to the ratio of nearness to, or distance from, the promoting cause.

SEC. 643. It may be said that the real distinction fairly deducible from all the cases entitled to any consideration as authorities, is this: When the wrongful act is of itself a disturbance or obstruction to the exercise of a public or common right, and in no wise inflicts any special damage upon one, more than another, the sole remedy is by indictment, unless special damage has actually been sustained by individuals, as in the case of negligently keeping large quantities of gunpowder on a public street or highway;³ carrying on a noxious trade on a public highway, but away from human habitations or places of business;⁴ keeping a bawdy-house, indecent or immoral practices, and many other nuisances that generally are of a purely public character. Now this class of injuries are usually purely public in their effects, but conditions may exist that make them private also. In the case of a negligent keeping of gunpowder, if a person owns property in the vicinity, and by reason of the fear and apprehension of danger,

¹ *Ross v. Butler*, 4 C. E. Green (N. J.), 294; *Davidson v. Isham*, 1 Stockt. (N. J.) 189; *Wolcott v. Melick*, 3 id. 207.

² *Francis v. Schoellkopf*, 53 N. Y. 152; *Wesson v. Washburn Iron Co.*, 13 Allen (Mass.), 95; *Soltau v. De Held*, 9 Eng. Law & Eq. 102; *Rex v. Dewsnap*, 16 East, 194.

³ *Sands v. The People*, Johns. (N. Y.)

⁴ *Rex v. Niel*, 2 C. & P. 485; *Brady v.*

Weeks, 3 Barb. (N. Y.) 156; *Catlin v. Valentine*, 9 Paige (N. Y.), 575; *Peck v. Elder*, 3 Sandf. (N. Y.) 126; *Story v. Hammond*, 4 Ohio St. 165; *Wesson v. Washburn Iron Co.*, 13 Allen (Mass.), 95; *Mills v. Hall*, 9 Wend. (N. Y.) 315; *Adams v. Michael*, 38 Md. 128; *Rex v. Dewsnap*, 16 East, 194; *Grabil v. R. R. Co.*, 50 Ill. 241; *Gas Co. v. Thompson*, 39 id. 598.

his tenants leave his buildings and he thus loses the rent therefrom, this is a special injury to him, apart from that suffered in common with the rest of the public, and he is entitled to his private action, both to recover the damages, and abate the nuisance, and this even though there are many others similarly situated and affected.¹

SEC. 644. So, too, in the case of a noxious trade upon a highway, but away from habitations, so long as every person sustains a common injury only therefrom as by being annoyed by its offensive and unwholesome smells, it is a purely public injury; but if its effects extend to the dwellings or places of business of any persons, to such an extent as to render their occupancy materially uncomfortable, then it becomes a private nuisance to those whose dwellings or places of business are so affected, and they may have their action therefor, although there are many persons who are thus affected, and the result will be to promote a multitude of suits.²

SEC. 645. In the case of a bawdy house, it is a public nuisance *per se* wherever located, and generally, only a proper subject of indictment, yet cases may arise where even that becomes also a private nuisance as to some. As if it is kept upon a street adjoining the tenements of another, and by reason thereof his tenants leave, and his property is greatly depreciated in value, does he not sustain a special damage, so particular to himself and different from that sustained by the rest of the public as fairly entitles him to an action for his damages?³

SEC. 646. Take the case of a sale of unwholesome meat or food. This is a public nuisance *per se* at common law. Is not every

¹ Weir v. Kirk, 1 Law Times (N. S.), 73; 73 Penn. St. 284; Cheatham v. Shearon, 1 Swan (Tenn.), 213; Wier v. Kirk, 73 Penn. St. 284; Myers v. Malcolm, Hill (N. Y.) .

² Knight v. Gardner, 19 Law Times (N. S.), 673; Cooke v. Forbes, L. R., 5 Eq. 166; Crump v. Lambert, L. R., 3 Eq. 407; Lansing v. Smith, 4 Wend. (N. Y.) 10; Francis v. Schoellkopf, 53 N. Y. 152; Wesson v. Washburn Iron Co., 13 Allen (Mass.), 95; Ross v. Butler, 4

Green (N. J.), 294; Ottawa Gas-light Company v. Thompson, 39 Ill. 598; Tipping v. St. Helen Smelting Co., E. C. L. 608; Story v. Hammond, 4 Ham. (Ohio) 376.

³ Hamilton v. Whitridge, 11 Md. 128. It was held in this case that the diminution in the value and use of property by reason of a brothel adjoining it, is such a special injury as entitles a party to an injunction from a court of equity.

person whose health is deleteriously affected by the consumption of the food, entitled to recover his damages for the injury?

SEC. 647. But whatever apparent conflict may have seemed to exist upon this question formerly, it is now well settled, as the doctrine of both the courts in this country and England, that a nuisance may be at the same time both public and private. Public in its general effects upon the public, and private as to those who suffer a special or particular damage therefrom, apart from the common injury. The public wrong is redressed by indictment, and the private injury by an appropriate private action either at law or equity.¹ An obstruction of a purely public right is seldom productive of private and individual damage, but where it is, it would be a highly unjust and inequitable doctrine that would preclude the party sustaining it, from proper redress by action, merely upon the ground that the injury has resulted from an act that is a public offense. In the language of Senator ALLEN, in *Lansing v. Smith*, ante: "If this is the law, it is high time that the law should be changed."

But such is not the law, and the cases are numerous where private actions have been upheld, both in courts of law and equity, to redress the private injuries resulting from public nuisances.

SEC. 648. In *Attorney-General v. Earl of Lonsdale*, 7 L. R. Eq. Cas. 390, it was held that a riparian owner upon the banks of a tidal stream could maintain an action for an injury to his property resulting from the erection of a jetty in a navigable stream, although the jetty was a public nuisance. MALINS, V. C., in passing upon the question, as to the right of the plaintiff to join with the Attorney-General in respect to a public nuisance, which was also a particular injury to himself, said, "The plaintiff might, perhaps, have instituted the suit without the Attorney-General, on the principle of *Spencer v. London & Birmingham R. R. Co.*, 8 Sim. 193, on the ground that the act complained of, although a public nuisance, causes a *special* and *particular* damage to him."

¹ *Soltau v. De Held*, 9 Eng. Law & Eq. 102; *Wesson v. Washburn Iron Co.*, 13 Allen (Mass.), 95; *Francis v. Schoellkopf*, 53 N. Y. 152; *Ross v. Butler*, 4 C. E. Green (N. J.), 294; *Davidson v. Isham*, 1 Stockt. (N. J.) 189; *Wolcott v. Melick*, 3 id. 207.

SEC. 649. In *Sampson v. Smith*, 8 Sim. 272, the plaintiff brought a bill to enjoin the defendant from using a steam-engine on Prince's street, in the vicinity of his shop, by reason of the smoke from which the goods in his shop were injured, and the enjoyment of his dwelling-house was rendered uncomfortable. It was objected on the hearing that the nuisance complained of was a *public* nuisance, and that the plaintiff could not maintain a private action therefor. Mr. KNIGHT BRUCE, afterward Vice-Chancellor, argued, that "Every individual may maintain an action or file a bill in respect of a public nuisance provided he sustains any particular damage from it. * * The public and the private right have nothing to do with each other. Supposing the nuisance complained of in this bill *is* a public nuisance, it is a *private* one also, and we do not apply for relief in respect of the public nuisance. * * Every individual who sustains an injury from a public nuisance, may sue in respect of it, *but* where the subject of the complaint is merely a *public wrong*, an information must be filed by the Attorney-General." It is noticeable that the doctrine announced by KNIGHT BRUCE, which was at that time quite new, forms the ground-work of the rights of individuals to maintain actions for special injuries from public nuisances, as adopted and acted upon by the courts of England and this country. In that case, prior to the argument of the case by him, SHADWELL, V. C., intimated a doubt as to the right of the plaintiff to maintain the bill, but after hearing the counsel upon both sides, he adopted the views of KNIGHT BRUCE and granted the injunction.

SEC. 650. In *Mills v. Hall*, 9 Wend. (N. Y.) 315, the plaintiff brought an action to recover damages sustained by reason of sickness produced in his family, in consequence of the setting back of the waters of a stream by defendant's mill-dam so as to render the atmosphere of the neighborhood unwholesome, and to breed sickness therein. SUTHERLAND, J., in deciding the case in favor of the plaintiff against the defendant's claim of a prescriptive right to set back the water, put the right of recovery upon the broad ground that the nuisance created, being a *public nuisance*, no prescriptive right could be acquired to maintain it. The

question of the plaintiff's right to recover, *because* the nuisance was public, was not raised in the case, but if it had been, there is no question that, upon the authority of *Lansing v. Smith*, 4 Wend. (N. Y.) 8, the action would have been upheld.

SEC. 651. In a recent case in the court of appeals of New York (*Francis v. Schoellkopf*, 53 N. Y. 162), which was an action for damages sustained by the plaintiff by reason of the noisome stench arising from the defendant's tannery, which rendered the enjoyment of her dwelling uncomfortable and almost uninhabitable for herself and family, and prevented her renting another dwelling which she owned in the vicinity, it was objected by the defendant's counsel that there could be no recovery in the case, because the nuisance was public; and that the only remedy was by indictment. GROVER, J., in delivering the opinion of the court, announced the true doctrine controlling this class of actions in a very forcible and sensible way. He says: "The evidence disclosed that other houses in the vicinity were similarly affected with the plaintiffs. The ground for the motion (for a nonsuit) was, that as the stench injured a large number of houses, the nuisance was common, and therefore no one could maintain an action for his particular injury, the only remedy being an indictment for the common injury to the public. The error of this is obvious, both upon principle and authority. The idea that if by a wrongful act a serious injury is inflicted upon a single individual a recovery may be had therefor against the wrong-doer, and that by it, the same act, a number of persons are injured, no recovery can be had by any one, is absurd. This, stripped of verbiage, is the ground of the motion. It is said that holding the defendant liable to respond to each one injured will lead to a multiplicity of suits. This is true, but it is no defense for a wrong-doer, when called upon to compensate for the damages sustained from his wrongful act, to show that he, by the same act, inflicted a like injury upon numerous other persons. The position is wholly unsustainable by authority. While in the application to particular cases there is some conflict, yet there is none whatever in the rule itself. That rule is, that one erecting or maintaining a common nuisance is not liable to an action at the suit of one who has sus-

tained no damage therefrom, except such as is common to the entire community, yet he is liable to one who has sustained damage peculiar to himself. No matter how numerous the persons may be who have sustained this peculiar damage, each is entitled to compensation for his injury. When the injury is common to the public and special to none, redress must be sought by a criminal prosecution in behalf of all.¹

SEC. 652. In *Soltau v. De Held*, 9 Eng. Law & Eq. 102, the objection was raised that the action could not be maintained, because the inquiry complained of resulted from a public nuisance; but *KINDERSLEY, V. C.*, thus disposed of this question. "Now, of course, in the case of a public nuisance, no doubt the remedy to get rid of the public nuisance is an indictment at law. The remedy at law is indictment, the remedy in equity no doubt is an information at the suit of the attorney-general; and so in the case of a private nuisance, the remedy at law is by action; the remedy in equity is by bill; and this is the distinction which is pointed out in those passages cited by Mr. Campbell, from the third volume of Blackstone's Commentaries and from Mitford's Pleadings, a very obvious, clear and recognized distinction; but it is evident that that which is a public nuisance may be also a private nuisance to a particular individual by inflicting on him some special and peculiar damage, and if it be both, that is, if it be in its nature a public nuisance, and at the same time does inflict on a particular individual a special and particular damage, may not that private individual have his remedy at law by action or in equity by bill? * * *

"Now several cases have been referred to,² in all of which, and in many other cases that might be cited, it has been held and acted on over and over again, that if an individual sustains a

¹ *Pierce v. Dart*, 7 Cow. (N. Y.) 609; *Lansing v. Smith*, 4 Wend. 10; *Milhau v. Sharp*, 29 N. Y. 611; *Soltau v. De Held*, 9 Eng. Law & Eq. 104; *Brunning v. N. O. Canal & Banking Co.*, 12 La. 541; *Yolo Co. v. Sacramento*, 36 Cal. 193; *Ottawa Gas-light Co. v. Thompson*, 39 Ill. 598; *Ross v. Butler*, 4 Green (N. J.), 294; *Barnes v. City of Racine*, 4 Wis. 454; *Rose v. Groves*, 12 L. J. (N. S.) 251; *Cole v. Sprowl*, 35 Me. 116;

Abbott v. Mills, 3 Vt. 529; *Harrison v. Sterrett*, 4 Har. & McH. (Del.) 540; *Burrows v. Pixley*, 1 Root, 362; *Wesson v. Washburn Iron Co.*, 13 Allen (Mass.), 95.

² *Spencer v. The London & Birmingham R. R. Co.*, 8 Sim. 193; *Sampson v. Smith*, id. 272; *Walter v. Selfe*, 4 Eng. Law & Eq. 15; *Attorney-General v. Forbes*, 2 M. & C. 123.

special and particular damage from an act, he may have a bill; if it be such a case as a court of equity may interfere in at all, he may have the interference of the court on a bill, although the act complained of be in its nature a public nuisance."¹

SEC. 653. It may be regarded as well settled, that the fact that an injury and damage is inflicted by an act or thing that is, in its nature and in fact, a public nuisance, will not prevent a recovery at the suit of an individual, if that individual has suffered a special and particular damage therefrom different from that which is common to all.

For the common injury, there can be no redress save by indictment or other remedy in behalf of the people; but for every special and particular injury, there may be redress had through the medium of private actions in behalf of each person specially injured, although the same damage is inflicted upon many persons at one and the same time,² as an obstruction of a highway leading to one's premises,³ or so as to obstruct access thereto, or otherwise producing special damage,⁴ the obstruction of a navigable stream so as to hinder or delay passage over the same, or producing actual damage to vessels,⁵ or by cutting off the approach to a private wharf or premises,⁶ or so as to injure one's premises,⁷ or the erection of any thing injurious to a

¹ Attorney-General v. Forbes, 2 M. & C. 123; Attorney-General v. Johnson, 2 Wils. Ch. 87.

² Michling v. Kittanning Bridge, 1 Grant's Cas. (Penn.) 416; Wesson v. Washburne Iron Co., 13 Allen (Mass.), 95; Francis v. Schoellkopf, 53 N. Y. 156; Lansing v. Smith, 4 Wend. (N. Y.) 10; Grigsby v. Clear Lake Co., 40 Cal. 396; Blanc v. Klumpke, 29 id. 156; Simpson v. Savage, 8 Sim. 272; Howard v. See, 3 Sandf. (N. Y. S. C.) 281; Cook v. Corporation of Bath, 6 L. R. Eq. Cas. 77.

³ Brown v. Watrous, 47 Me. 161.

⁴ Stetson v. Faxon, 19 Pick. (Mass.) 147; Burden v. Crocker, 10 id. 388; Corning v. Lowerre, 6 Johns. Ch. (N. Y.) 641; Milhau v. Sharp, 27 N. Y. 611; Baxter v. Winooski 22 Vt. 272; Knox v. Mayor of N. Y., 55 Barb. (N. Y.) 404; Savannah R. R. Co. v. Shiels, 33 Ga.

601; Hatch v. R. R. Co., 25 Vt. 142; Cook v. Corporation of Bath, 6 L. R. Eq. Cas. 77.

⁵ Powers v. Irish, 23 Mich. 429; Barnes v. Racine, 4 Wis. 454; Gerrish v. Brown, 51 Me. 256; Veazie v. Deniel, 50 Me. 490; Knox v. Chalouse, 42 Me. 150; R. R. Co. v. St. Louis, 5 Chicago Leg. News, 49; Parrish v. Stephens, 1 Oregon, 73; Baird v. R. R. Co., 6 Bl. (U. S. C. C.) 487; Mississippi R. R. Co. v. Ward, 2 Black (U. S.), 485; Georgetown v. Canal Co., 12 Peters (U. S.), 91; Works v. Junction R. R. Co., 5 McLean, 425; Cole v. Sprowl, 35 Me. 161; Hughes v. Heiser, 1 Binney (Penn.) 493; Boston Rolling Mills v. Cambridge, 117 Mass. 396; Clark v. Peckham, 10 R. I. 35.

⁶ Burrows v. Pixley, 1 Root (Conn.), 382; Frink v. Lawrence, 20 Conn. 117.

⁷ Attorney-General v. Earl of Lonsdale, 7 L. R. Eq. Cas. 380.

special franchise, as a bridge, ferry, turnpike, or other special privilege.¹

The setting up of a noxious trade specially injurious to private property, whether by impairing its comfortable enjoyment or its rental, or market value² as a slaughter-house,³ a fat-boiling establishment,⁴ a bone boilery,⁵ a planing mill,⁶ a rolling mill,⁷ a trip-hammer shop for hammering iron or steel rails, or any noisy trade in a public place specially injurious,⁸ gas works emitting nauseous odors,⁹ or polluting public rivers to the injury of private rights,¹⁰ keeping powder, nitro-glycerine or other explosive and highly combustible substances in public places near one's premises, endangering the safety of those living there, and thereby impairing the rental or actual value of the premises,¹¹ and, in fact, any use of property that, while it creates a public injury, also creates a special and particular injury to individual members of the public, even though the injury and damage is merely nominal.¹²

¹ *Charles River Bridge Co. v. Warren Bridge*, 6 Pick. (Mass.) 376; *Norwood v. Norwood*, 4 H. & J. (Md.) 112; *Turnpike Co. v. Ryder*, 1 Johns. Ch. (N. Y.) 611; *Hall v. Ragsdale*, 4 S. & P. (Ala.) 252; *Phillips v. Stockton*, 1 Overton (Tenn.), 270.

² *Francis v. Schoellkopf*, 53 N. Y. 156; *Rex v. Dewsnap*, 16 East, 169; *Biddle v. Ash*, 2 Ash (Penn.), 211; *Norcross v. Thoms*, 51 Me. 503; *Ross v. Butler*, 19 N. J. 294; *Cleveland v. Citizens' Gas-light Co.*, 20 id. 201; *Greene v. Nunnemacher*, 36 Wis. 50.

³ *Catlin v. Valentine*, 9 Paige's Ch. (N. Y.) 575; *Fay v. Whitman*, 100 Mass. 597; *Brady v. Weeks*, 3 Barb. (N. Y.) 156; *Dubois v. Budlong*, 10 Bos. (N. Y.) 700.

⁴ *Peck v. Elder*, 3 Sandf. (N. Y. S. C.) 126.

⁵ *Meigs v. Lester*, 23 N. J. 340.

⁶ *Duncan v. Hayes*, 22 N. J. 197; *Ross v. Butler*, 19 id. 294; *Thiebault v. Conover*, 11 Fla. 143; *Cartwright v. Gray*, 12 Grant's Ch. Cas. (Ont.) 600; *Rhodes v. Dunbar*, 57 Penn. St.

⁷ *Wesson v. Washburne Iron Co.*, 13 Allen (Mass.), 95.

⁸ *Eaden v. Firth*, 1 Macph. (Sc.) 573; *Scott v. Firth*, 16 L. T. (N. S.) 241; *Dennis v. Eckhardt*, 3 Grant's Cas. (Penn.) 274; *First Baptist Church and Society v. R. R. Co.*, 5 Barb. (N. Y.) 79.

⁹ *Cleveland v. Citizens' Gas-light Co.*, 20 N. J. 201; *Ottawa Gas Co. v. Thompson*, 39 Ill. 598; *People v. Manhattan Gas Co.*, 64 Barb. (N. Y.) 55; *Broadbent v. Imperial Gas Co.*, 7 H. L. Cas. 600.

¹⁰ *Rex v. Medley*, 6 C. & P. 292; *Carhart v. Auburn Gas-light Co.*, 22 Barb. (N. Y.) 297.

¹¹ *Malcolm v. Myers*, 6 Hill (N. Y.), 292; *Weir v. Kirk*, 73 Penn. St. 78; *Fillo v. Jones*, 2 Abb. Pr. (N. Y.) 121; *Ryan v. Copes*, 11 Rich. (S. C.) 217; *Crowder v. Tinkler*, 19 Vesey, 623; *Hepburn v. Lordon*, 13 L. T. (N. S.) 59.

¹² *Mills v. Hall*, 9 Wend. (N. Y.) 315; *Lansing v. Smith*, 4 id. 8; *Morris R. R. Co. v. Prudden*, 20 N. J. 530; *Woodman v. Manufacturing Co.*, 1 Abb. (U. S. C. C.) 153, diversion of water of navigable stream; *Philadelphia v. Collins*, 68 Penn. St. 106; *Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. (U. S.) 565; *Yolo v. Sacramento*, 36 Cal. 193; *Mayor v. Marreoth*, 9 Md. 160; *Harrison v. Sterrett*, 4 Har. & McH. (Md.) 540; *Abbott v. Mills*, 3 Vt. 529; *Baxter v. Winooski*, 22 id. 414; *Smith v. Lockwood*, 13 Barb. (N. Y.) 209; *Hughes v. R. R. Co.*, 5 Rich. (S. C.) 583; *Pittsburgh v. Scott*, 1 Penn. St. 309; *R. R. Co. v. Philpot*, 28 Ga. 398; *Geigor v. Filor*, 8 Fla. 325; *Alden v. Pinney*, 12 id. 348.

SEC. 654. In such actions, the gravamen of the complaint is the special and particular injury, therefore the recovery is limited to such *special* and particular damage as is alleged in the declaration and established by the proof. There can be no exemplary or punitive damages given, nor any damage for the injuries arising from the natural and common effect upon the public generally.¹ If by reason of the promoting cause, such as noxious vapors, noisome smells or dense smoke, one is driven from his dwelling, or his tenants leave his buildings, or his property is specially injured, he can only recover the actual loss and damage that comes legitimately under the head of special injury. That portion of the damage that is common to all, is "*damnum absque injuria*."

SEC. 655. It is only when the injury arising from a nuisance is to a purely public right, so that the injury arising therefrom is general and public in its effects, that individuals are precluded from bringing private suits for the violation of their individual rights; or, to state the proposition in a form which more nearly embodies the doctrine, it is only when the nuisance is in its nature a public nuisance, so that no private right is violated in contradistinction to the rights of the rest of the public, that the courts deny a remedy to individuals. Whenever the nuisance is susceptible of being both public and private, and is so to such an extent that an actual vested individual right is violated, which the

Gunter v. Gearey, 1 Cal. 467; Memphis R. R. Co. v. Hicks, 5 Sneed (Tenn.), 427; Turnpike Co. v. Crockett, 2 id. 263; Miller v. Truehart, 4 Leigh (Va.), 569; Smith v. McConathy, 9 Mo. 517; Adams v. Michael, 38 Md. 134; Wilton v. Martin, 7 Mo. 307; Babcock v. N. J. Stock Co., 20 N. J. 296; Rosser v. Randolph, 7 Porter (Ala.), 238; Wall v. Cloud, 3 Humph. (Tenn.) 181; Free-land v. Gas Co., 12 Ohio St. 392; Pottstown Gas Co. v. Murphy, 39 Penn. St. 257; Wetmore v. Atlantic, etc., Co., 37 Barb. (N. Y.) 70; Wetmore v. Story, 22 id. 414; Carey v. Brooks, 1 Hill (S. C.), 365; Allen v. Lyon, 2 Root (Conn.), 213.

¹ Francis v. Schoellkopf, 53 N. Y. 152; Wesson v. Washburne Iron Co., 13 Allen (Mass.), 94; White v. Cohen, 19

Eng. L. & Eq. 146. In Fay v. Parker, 53 N. H. 342, the doctrine is laid down and established by an able and exhaustive review of the whole field of the law of damages, that *punitive* or exemplary damages can never be recovered in an action where a public prosecution lies against the defendant for the offense that forms the subject-matter of the action. The court also pertinently question the soundness of the doctrine permitting punitive damages in *any* case, making the true distinction between matters in aggravation of damages, and exemplary or punitive damages, the court evinces a tendency to repudiate a doctrine that never had any foundation in reason or public policy.

individual may lose by *laches*, then he is entitled to his private remedy, even though the damage be trifling, and even though the result be to open the door to a multiplicity of suits.¹ It is evident, from an examination of all the cases, that the courts have never really intended to establish any other or different doctrine. All the early cases referred to in this chapter were cases of nuisances arising in highways and navigable streams over which the public has full control, and in and to which one person has no more rights than another, so far as the actual public easement is concerned, and where no person could lose any rights by reason of any neglect on his part to pursue his remedy for redress.² But, in all those cases, where the party sustained any really special damage, however small, the courts upheld his remedy.³ That this prohibition of private actions, for injuries resulting from public nuisances, was ever intended to apply to any other class of cases than those designated above, is apparent from all the authorities, ancient or modern.

SEC. 656. It was never intended by the courts to hold that where a vested right was injured, this was not a sufficient special damage to maintain an action against the promoter of a public offense.

In *Morley v. Pragnal*, Cro. Car. 510, which was an action for corrupting the air by the prosecution of the business of a tallow chandler upon a public street in the city of London, in a locality where the business, producing such noxious and noisome smells, must of necessity have been a public nuisance and indictable as such, the plaintiff's action for his private damage by reason of the injury to his business as an innkeeper, in the loss of guests, and

¹ *Francis v. Schoellkopf*, 53 N. Y. 152; *Wesson v. Washburne*, 3 Allen (Mass.), 95.

² *Woolrych on Ways*, 4.

³ *Wilkes v. Hungerford Market Co.*, 2 Bing. 281; *Aldred's Case*, 9 Coke, 58; *Robins' Case*, cited in Palm. 536; *Lily's Reg.* 309; 2 *Rolle's Abr.* 40; *Morley v. Pragnal*, Cro. Car. 570; *Chichester v. Lethbridge*, Willes, 71; *Hart v. Bassett*, T. Jones, 156; *Iveson v. Moore*, Ld. Raym. 486; *Hughes v. Heiser*, 1 Binn. (Penn.) 463; *Pierce v. Dart*, 7 Cow. (N. Y.) 609; *Greasley v. Codling*, 2 Bing. 263; *Rose v. Groves*, 12

Law J. (N. S.) 251; *Yolo v. Sacramento* 36 Cal. 193; *Barnes v. Racine*, 4 Wis. 454; *Blanc v. Klumpke*, 27 Cal. 156; *Carpenter v. Mann*, 17 Mass. 155; *Winterbottom v. Lord Derby*, L. R., 2 Exch. 316; *Paine v. Patrich*, 3 Mod. 289; *Fineux v. Hovenden*, Cro. Eliz. 664; *Rose v. Miles*, 4 M. & S. 101; *Hubert v. Groves*, 1 Esp. (N. P. Cas.) 148; *Co. Litt.* 56 a; *Bellows v. Kemp*, Cro. Eliz. 664; *Fowler v. Sanders*, Cro. Jac. 446; *Maynell v. Saltmarsh*, 1 Keb. 847; *Stone v. Wakeman*, Noy. 120; *Allen v. Ormond*, 8 East, 4.

the unwholesome effects upon his family was upheld, and the objection was not raised, that this being a public nuisance, the plaintiff could not have his remedy. Suppose it had been, reasoning from analogy, how would the court with the nice regard for men's rights that were then entertained, and the strict application of legal principles that were then practiced, in all cases coming before it, have been likely to have disposed of this objection? It would most likely have said that this case came clearly within the provisions of the maxim, "So use your own property as not to damage another," and that if in the use of one's own property, or in the exercise of a right, he used or exercised it in such an unlawful manner as not only to injure public, but also individual, rights, that would be lost if they were not properly asserted, he should respond to the suit of the public, and also to each person whose private rights were injured, even though they had been many in number. In the case of actions arising out of the obstruction of a highway in which this doctrine was established in the English courts, the rule was, and is, both salutary and just, for if it were otherwise, any man, whether he had occasion to use the highway for any beneficial purpose to himself or not, might bring his suit, and as Lord COKE says: "This would lead to great multiplicity of suits and endless litigation." Again, a person's right to travel upon a highway is not a natural right, neither is it personal, it is a right that is given by operation of law, and one that the public can at any time deprive him of. He loses no right by its obstruction that will be lost by any *laches* on his part in its assertion or maintenance. It is not like the right to air, light and water which can be modified or changed by an unopposed use in a particular way by others, in other words, it is in no sense a personal right, but wholly and entirely public. No length of time will either fix or destroy his right of passage over it. The duration of the exercise of that right depends wholly and entirely upon the will and action of the proper public authorities, and an obstruction of it is an obstruction not to individual, but purely public rights. The rule established and followed by the courts in all actions on the case for consequential injuries was predicated on the same ground, to wit: that the injury must result from the violation of a right peculiar to the individual injured.

SEC. 657. In *Robert Mary's Case*, 9 Coke, 113, the court announced the rule that lies at the foundation of the doctrine upon which is predicated the right of a party to recover for consequential injuries, whether arising from a private or public nuisance. The court say, in an action by the commoner against a stranger for feeding the common with his cattle, "For every feeding by the cattle of a stranger, the commoner shall not have an *assize*, nor an action on the case, as his case is, but the feeding ought to be such *per quod*, the commoner, etc., common of pasture, etc., for his cattle, etc., *habere non potuit, sed proficium suum inde per totam id, tempus amisit, etc.*, so that if the trespass be so small that he hath not any loss, but sufficient and ample feed remains for him in quantity and kind, he shall not have an *assize* nor an action." "But," adds the court, "the tenant of the land may have his action." The reason is obvious, no personal right of the commoner has been violated. His right consists in having the feed for his cattle in common with all others who are equally entitled, and unless the declaration and proof disclose the fact, that by reason of the trespass of the stranger's cattle, his cattle have been deprived of proper feed, he has sustained no loss or damage, neither has his right been injured. The stranger, by his trespass, acquires no right even by long and continued trespasses as against the commoner.

It is only the tenant of the land against whom he can acquire a right by long and adverse user, and it is only the tenant's right that can thereby be defeated. But when, by reason of the stranger's cattle being upon the common, the commoner's cattle have less feed than is necessary, then the commoner's right is injured, and he may have his special action therefor. The rule is, that damage and injury must both be proved, except where a private right is injured, that may be lost by the *laches* of the individual. In 2 Brownl. 148, H. pl. 49, the author lays down the doctrine thus, and it is adopted by the court in *Robert Mary's Case*, *supra*, and also in *Pitt v. Lewis*, K. B., referred to by Sergeant HILL in his edition of *Coke's Reports*: "If my servant is beat, I shall not have an action for this battery, unless the battery is so great that, by reason thereof, I lose the service of my servant; but the servant himself, for every small

battery, shall have an action, and the reason is, that the master has not any damage by the personal beating of his servant, except by reason thereof *he loses his services*, so that the cause of his action does not depend upon the original act, but upon the consequence of it." The master's right is to the service of his servant, and no injury to the servant that does not deprive him of that right can be construed as an injury to the master.

SEC. 658. The rule anciently adopted by the courts, in reference to injuries from the violation of private rights, will not justify the conclusion that they ever intended to hold that where a private right was injured by a public nuisance, there should be no private remedy, however small the damage. For all through the reports we find instances, without number, where the courts have upheld actions for injuries to private rights, even where no damages were proved, showing the nicest regard for individual rights, and building up a system for their protection that commands the admiration and respect of all mankind.¹

SEC. 659. The distinction intended to be observed by the courts is well expressed in *Robert Mary's Case*, *supra*: "It is true that for a nuisance in the highway, without special damage, none shall have a special action, for it is not *damnum privatum* (private damage), but *damnum commune* (common damage), and, therefore, it ought only to be punished and reformed at the king's suit, for a public nuisance shall not be reformed at the suit of a private party, for the damage is not private, but public."

SEC. 660. Now, it will be observed, that the court refers to public nuisances in the highway, and gives as a reason why a private party shall not have his private remedy, except he be specially damaged, that such damage is, in its own nature, public, and not private. But if the person injured by the nuisance in a highway, as by an obstruction by which he was only delayed in his journey, or from which he had sustained no special damage

¹ *Ashby v. White*, 2 Ld. Raym. 1024; *Wells v. Watting*, 2 Bl. 1233; *Williams v. Morland*, 2 B. & C. 919; *Bronge v. More*, Styles, 428; *Ayre v. Pyncombe*, id. 164; *Williams' Case*, 3 Coke, 147; *Hohson v. Tood*, 4 T. R. 73; *Iveson v. Moore*, 1 Ld. Raym. 486; *Smith v. Fernall*, 2 Mod. 6; *Hassard v. Cantrell*, 1 Lut. 107; *Mellor v. Spateman*, 2 Saund. 346; *Atkinson v. Lunsdale*, 2 Wils. 290; *Greenshaw v. Illsey*, Willes, 619.

at all, except an interruption of his public right, sets up in his declaration that he or his grantors had a *private* way over the highway before it became a highway, then the person setting up this private right may maintain his private action for the injury to his private right, and that, even though he has suffered no special damage; and the distinction is, that although he has sustained no actual damage, yet he sustains an injury not common to the public, because, in addition to the right he has acquired to travel over the road as one of the public, he has also a private right of way that outlasts the public right, and that may be lost by *laches* on his part in asserting and maintaining. This was held in the case of *Allen v. Ormond*, 8 East, 4, and is sustained by a multitude of authorities. In *Wells v. Watling*, 2 Black. 1233, this idea that wherever a person has a private right, independent of, or in addition to, the public, that may be lost by adverse user, the party whose right is injured may have his private action, even though he sustains no actual damage, is fully sustained.

SEC. 661. So, also, in *Hobson v. Todd*, 4 T. R. 73, which was an action on the case in favor of one commoner against another for surcharging a common, BULLER, J., after referring to the decision in *Robert Mary's Case*, says: "There is another ground on which this action may be supported, which is, that the plaintiff's right has been injured; and if a commoner cannot bring such an action as this because his cattle had grass enough to prevent them from starving, he must permit a wrong-doer like the defendant to gain a right against him by possession. Here the plaintiff has proved all his declaration, by proving his right of common, and that the defendant has put on more cattle than he had a right to." And GROSE, J., concurred in this opinion, and said: "I am not inclined to encourage this action on any other ground than that mentioned by my brother BULLER, namely, that if it infringe the right of common of B, it is necessary that B should have A's right ascertained, otherwise this wrongful act would, in process of time, become evidence of his right."¹ If a

¹ In *Pindar v. Wadsworth*, 2 East, 145, which was an action against a stranger for taking manure from the common, the jury having found a ver-

dict for the plaintiff, fixing the damage at only one farthing, the court refused to enter a nonsuit, upon the ground that the jury, by their verdict, decided

special, individual right is injured, an action lies if there be *any* damage, however small in amount, but in order to uphold the action there must be *some* damage, as *damnum et injuria* must both be alleged and proved, but if there be a clear violation of a right, damage is presumed, to the extent necessary to support it.

In *Bronge v. More*, Styles, 428, the same doctrine was held, with this addition, that the commoner may distrain the beasts of the stranger, and need not show that he sustained any damage.

SEC. 662. Thus, without stopping to review the multitude of early cases in which this principle was universally recognized and sustained, it is safe to say, that whenever a person's private rights, such as rights to air, water, light or those that have been acquired by grant or prescription, are so injured by a wrongful use of property by another, or by his wrongful personal act, the person whose right is so injured may maintain his action therefor, even though the act is a public nuisance. Whenever a person's individual rights, rights that are not derived from, or dependent upon the will of the public, are injured, this is such special injury as entitles him to damage to sustain the right. But there are a class of cases where the use of property by another, while it produces an actual public injury, at the same time injures private rights, and where it may be said that the very *essence* of the offense consists in the aggregation of this invasion of private rights. An offense which, if it embraced within the sphere of its operations but a few persons, would be a private nuisance simply, but which, by its location, extends its wrongful effects upon so many persons, that it becomes a public offense also. This class of wrongs, of whatever nature or effect, that invade *private* rights as well as *public*, always have been, and always can be, redressed by suits in favor of those whose private rights are invaded, even though it opens the door to a multitude of actions

that the plaintiff's right had been violated. See *Williams v. Morland*, 2 B. & C. 916. Lord DENMAN in *Lockwood v. Wood*, 6 Q. B. 69; *Wells v. Watling*, 2 Black. Rep. 1235. In *Hobson v. Todd*, 4 T. R. 73, BULLER, J., says: "It has been said by one of the counsel that the plaintiff must prove a *serious* injury, relying upon the words of

BLACKSTONE, J. But the expression used by the judge does not warrant such a construction, for it did not appear that the plaintiff had a single beast which he could put on the common. The *only* question is, whether any injury has been done by the defendant to the plaintiff."

for the same wrongful act. The distinction is this: Where a private, personal right is invaded, the very fact of its invasion "imports a consequent damage."¹ A man cannot stand by and suffer another to corrupt the atmosphere in the neighborhood of his dwelling, to make and maintain an erection that shuts out the light from his ancient windows, or to divert the water of a natural stream that should flow to him undiminished in quantity and unpolluted in quality; if he does, his natural rights are lost, and become modified by, and burdened with, this unlawful use by another.² Therefore, any injury to such private rights, even though its effects are so general as to bring it within the rule as to public nuisances, are such special and particular damage as brings the party within the beneficial operation of the rule in reference to suits for injuries arising from public nuisances.³

SEC. 663. The case of *Wesson v. The Washburn Iron Co.*, 13 Allen (Mass.), 95, was an action for damages occasioned by the dust, smoke, noise and jarring effects of the defendant's works, located near the plaintiff's dwelling-house or inn, the operations of the machinery in which, were such as to shake and greatly injure the plaintiff's building, and the cinders, dust and smoke from which at times filled the house to such an extent as to nearly suffocate the occupants, and for injuries from the dust and cinders, which would at times settle on the furniture and blacken the walls of the building, by reason of which the plaintiff claimed that she lost great gains from her inn, and that the rental value of her premises were greatly reduced. It was insisted by the defendants (and it seemed to be conceded on the trial) that the extent of these effects were such, that the works were a public nuisance, and it was claimed by the defendant that consequently,

¹ Lord HOLT in *Ashby v. White*, 2 Ld. Raym. 1093; *Spooner v. McConnell*, 1 McL. (U. S. C. C.) 388; *Wells v. Watling*, 2 Bl. 1233; *Pindar v. Wadsworth*, 2 East, 155. GROSE, J., in *Hobson v. Todd*, 2 East, 161; *Tunbridge Wells Dippers*, 2 Wilson, 422.

² *Bankhardt v. Houghton*, 27 Beav. 425; *Crossley v. Lightowler*, L. R., 3 Eq. Cas. 279; *Hunt v. Peake*, 29 L. J. (Ch.) 785; *Brown v. Windsor*, 1 Cr. & J. 27; *Rogers v. Tayler*, 27 L. J.

(Exch.) 165; *Sampson v. Hodinott*, 26 id. 148; *Saunders v. Newman*, B. & Ald. 261; *Gaved v. Martyn*, 34 L. J. (C. P.) 353.

³ *Grigsby v. Clear Lake Co.*, 40 Cal. 396; *Wesson v. Washburne Iron Co.*, 13 Allen (Mass.), 95; *Rex v. Dewsnap*, 16 East, ; *Acton v. Blundell*, 11 M. & W. 349; *Mason v. Hill*, 5 B. & Ad. 1; *Wright v. Howard*, 1 Sim. & Stu. 190; *Tyler v. Wilkinson*, 4 Mason (U. S.), 401; *Runnels v. Bullen*, 2 N. H. 532.

no recovery could be had by the plaintiff. A verdict was rendered for the plaintiff, and in the Supreme Court, BIGELOW, J., gave expression to the rule to be observed in such cases, as follows: "There are a class of cases in which the essence of the wrong consists in an invasion of private rights, and in which the public offense is committed, not merely by doing an act which causes injury, annoyance and discomfort to one or several persons who may come within the sphere of its operations or influence, but by doing it in such a place, and in such a manner, that the aggregate of private injuries become so great, and extensive, as to constitute a public annoyance and inconvenience, and a wrong against the community, which may properly become the subject of a public prosecution.

But it never has been held, so far as we know, that in cases of this character the injury to private property or to the health and comfort of individuals becomes merged in the public wrong so as to take away from the persons injured the rights which they would otherwise have, to maintain actions to recover damages which each may have sustained in his person or estate from such wrongful acts. Nor would such a doctrine be supported by sound principle. Carried out practically, it would deprive persons of all redress for injuries to property or health, or for personal conveyance and discomfort in all cases where the nuisance was so general as to be the legitimate subject of public prosecution, so that in effect a wrong-doer would escape all liability to make indemnity for private injury by carrying on an offensive trade or occupation in such a place and manner as to cause injury and annoyance to a sufficient number of persons to create a common nuisance."

Injury to one's private property or to his health or comfort is special. The rule of damage is, that if, by reason of a public nuisance, a man is compelled to rent his premises, if at all, for a less sum than they would command except for the nuisance, the recovery should be limited to the actual loss in their rental value. If the nuisance was of that character that the premises could not be rented at all, the rule would be for damages to the amount of the actual rental value of the premises, if no nuisance existed.

If a dwelling actually occupied by the defendant and his

family becomes uninhabitable by reason of the nuisance, the damages would be limited to the actual rental value of the dwelling during the time that it was unoccupied, together with such actual expenses as were incident to the party's removal therefrom.¹

SEC. 664. As a further illustration of the application of the rule, and as showing what classes of injuries arising from public nuisances, courts have usually regarded as entitling a party to his remedy, I have deemed it advisable to give extracts from some of the cases in which it has been held that no such special injury was shown as entitled a party to his private remedy, as I deem this the best method of illustrating the rule, as each case must necessarily stand upon its own merits, and no general rules can be given that are applicable to all. It is easy to say "that a person may have an action to recover damages arising from a public nuisance, that are special and particular to him, and that are not a part of the common injury," but that does not afford the light needed. The question is, what damages are regarded as special and particular, and what are not, and this can be best answered by reference to what has been done and held by the courts in particular cases.

SEC. 665. In the case of *Seeley v. Bishop*, 19 Conn. 135, which was an action for an obstruction of a navigable creek and a private way, so as to prevent the plaintiff, as well as others owning lands on the creek, from using the same, as they had been accustomed to do, to take away their hay and the products of their farms. The court say: "As to the obstruction of the creek, it appeared that it was used for landing and floating boats loaded with hay. This was a public highway, and if the plaintiff's injuries are such as would entitle him to recover ordinarily, what peculiar damage has he sustained that would entitle him to a recovery in a civil suit? If he can sue, so can every man who owns land on the creek; or were it a river, every man who owns land on its banks. The public authorities alone can complain of

¹ *Wesson v. Washburn Iron Co.*, 13 Allen (Mass.), 95; *Francis v. Schoellkopf*, 53 N. Y. 152. But see *Potter v. Froment*, 47 Cal. 165, as to rule of damages when the plaintiff occupies the premises himself.

a nuisance while it remains public and general, while any individual may sue for a particular injury sustained by him.”¹

In this case, it is held that inasmuch as the injury occasioned by the obstruction is common to all who own property on the creek, as they all used its waters for the same purpose, and the injury results simply from the obstruction, no special damage having been shown, but the whole damage, if any, resting in contemplation, the plaintiff sustained no such particular damage, apart from the rest of the public, as would entitle him to maintain an action for individual damage.

If the plaintiff had had a private right of passage over the creek, growing out of his relation to it as riparian owner, and had actually been prevented from transporting his products over it, and thus been subjected to loss, in time or money, a different question would have been presented. But neither the bill nor the evidence disclosed any special ground of injury. The right claimed and alleged to be obstructed, was the *common right of passage*, and not a special or particular right growing out of his relation to the creek, either as riparian owner, or by grant or prescription.

SEC. 666. In *O'Brien v. The Norwich and Worcester R. R. Co.*, 17 Conn. 371, which was a bill in equity to enjoin the defendants from erecting their railroad so as to obstruct the navigation of a certain cove, down which the plaintiff and others had always been accustomed to pass with boats and vessels to the sea itself, WAITE, J., in delivering the opinion of the court, says: “This bill is brought by the plaintiff, a private individual, to restrain the extension of the defendant’s railroad over the Poquellannock cove, an arm of the sea.

In a very recent case, we had occasion to examine the principles which govern suits of equity in cases of this kind, and after a careful examination of the authorities, we held that a bill in equity will not be entertained for an injunction against a public nuisance, unless it shows that the plaintiff will sustain a special and particular damage from it; an injury distinct from that done

¹ But, contra, see *Lansing v. Smith*, 316; *Carpenter v. Mann*, 17 Wis. 155; 4 Wend. (N. Y. S. C.) 10; *Winterbottom v. Lord Derby*, L. R., 2 Exch. *Blanc v. Klumpke*, 27 Cal. 156.

to the plaintiff at large. * * * If this road, when built, will become a public nuisance upon the cove, the next inquiry is, what special damage will the plaintiff sustain — what injury distinct from that done to the public at large? He says that the right to pass up and down that cove is a common right, the enjoyment of which is valuable to the plaintiff, both in respect to trade and commerce, the building and launching of vessels, and for agricultural purposes and fisheries; and that he is in danger of being deprived of his lawful right to navigate the same, unless relieved by the court as a court of equity. The same injury might result to every other citizen who might have occasion to pass up and down that cove for similar purposes. He does state that his residence is in the village at the head of the cove; but he complains of an injury that will be done to his house, wharf or his land by means of the defendant's road. He will merely be deprived of his right to navigate public waters, common to him and all others, as he otherwise might. For such an injury, it is for the government to interfere and not a private individual. The court could then look to the rights of the whole community, and not to the rights of a single individual.”¹

SEC. 667. In this case, the only injury complained of was the injury to the common right of navigation.

If the bill had shown that, by reason of the obstruction, he had been deprived of access to his dwelling, to his ship-yard or to a private wharf,² the value of his dwelling or property would be greatly reduced, or his business be seriously injured or destroyed, that would have been such special damage as would have entitled him to his remedy.³

SEC. 668. In *Higbee v. Camden and Amboy R. R. Co.*, 19 N.

¹ Attorney-General v. Johnson, 2 Wils. Ch. 87; Attorney-General v. Forbes, 2 M. & C. 123; Corning v. Lowerre, 6 Johns. Ch. (N. Y.) 439; Spencer v. London & Birmingham R. R. Co., 8 Sim. 292, Coates v. Clarence R. R. Co., 1 Russ. & My. 181; Rex v. Dewsnap, 16 East, 194; Attorney-General v. Cleaver, 18 Ves. 211; Attor-

ney-General v. Utica Land Co., 2 Johns. Ch. (N. Y.) 378.

² Frink v. Lawrence, 20 Conn. 120, Clark v. Saybrook, 21 id. 319; New London v. Brainard, 23 id. 554.

³ Stetson v. Faxon, 19 Pick. (Mass.) 147; Thayer v. Boston, id. 511; Iveson v. Moore, 1 Ld. Raym. 486; Maynell v. Saltmarsh, 1 Keb. 847.

J. Ch. (C. E. Green) 278, the plaintiff complained that the defendants had leased, of the proper authorities of the city of Burlington, so much of Broad street as might be necessary for an additional track along said street, and a depot building and platform for the accommodation of passengers. The building was to be erected within 39 feet of the complainant's premises and would narrow the passage to 12 feet at one point; but a track of 27 feet was to be kept clear between the track and the north curbstone; but it was intended to erect a platform 10 feet wide along the track on part of the complainant's lot, which would be on the south side of the center of the street, and would leave a passage for carriages 24 feet wide.

The plaintiff predicated his claim for an injunction upon two grounds: First, that the proposed erections on the public street were illegal and a nuisance; and, second, that the defendant proposed to take his property without compensation. The court says: "An individual cannot maintain a suit to restrain a nuisance which injures him only in rights enjoyed by him as one of the public. In such case an information must be filed for the public in the name of the Attorney-General, on behalf of the State. If the complainants own the soil to the middle of the street in front of their land, the injury to that is to the rights of the complainants as individuals, and not of part of the public, and this suit is the proper form of remedy. But on all other parts of the street their right is only in common with the public; they, like all other citizens, have a right to pass over the street, and the injury to them in being deprived of this right is suffered by the rest of the public, and it makes no difference that they would probably have more occasion to use that part of the street than the rest of the public would. The injury would still consist in their being deprived of the enjoyment of a common public right, which is not their private property.

"*They are not deprived of access to their lands*, which would be an injury peculiar to them. They are not deprived of any *rights or easement* which they are entitled to as owners of the property. * * * For an erection proposed, not on that part of the street *in front of their lands*, they cannot have relief, *whether such use of the street be lawful or not.*"

An injunction was granted restraining the proposed use of that part of the street in front of the plaintiff's lands.

SEC. 669. In *Stetson v. Faxon*, 19 Pick. (Mass.) 147, the defendant having erected a warehouse projecting several feet into the public street, and beyond the plaintiff's warehouse standing near, on the line of the street, whereby it was obscured and travel was diverted to a distance from it, and it thereby became less eligible as a place of business, and in consequence thereof the plaintiff was compelled to rent it for a much less price than formerly, it was held by the court that *this* was sufficient special damage to entitle the plaintiff to his private *action*, although the defendant's building was a public nuisance.¹

SEC. 670. Any obstruction of a vested right, whether the obstruction is a public nuisance or not, is such a special injury as will support an action at the suit of an individual.² As any erection made or obstruction placed upon that part of a highway or public street, in which the party complaining owns the fee. Nor is it necessary that the erection or obstruction should work an injury to the reversion. The owner of the adjoining lands is the owner of the fee in the highway or street contiguous thereto, and the public only has an easement therein, and can only use the same for such purposes as are legitimately incident thereto for the purposes of public travel.³

The owner of the fee may maintain ejectment against one who appropriates any part of the street,⁴ or trespass against any one who exercises his right of transit over the same in an unreasonable manner.⁵

¹ *Thayer v. Boston*, 19 Pick. (Mass.) 511; *Ayer v. Pyncombe*, Styles, 164; *Williams v. Morland*, 2 Barn. & Cress. 916; *Hobson v. Todd*, 4 T. R. 13. Decrease in the rental value of premises by a nuisance is a special injury. *Francis v. Schoellkopf*, 53 N. Y. 152; *Knox v. Mayor, etc.*, 55 Barb. (N. Y. S. C.) 404; *Rose v. Groves*, 1 Law Rep., C. B., 781.

² *Kelk v. Pearson*, L. R., 6 Ch. App. 16; *Dent v. Auction Mar. Co.*, L. R., 2 Eq. 238; *Martin v. Headon*, id. 425; *Ashby v. White*, 2 Ld. Rayd. 1093; *Fay v. Prentice*, 1 C.B. (N. S.) 821; *Wells*

v. Walting, 2 Blackst. 1233; *Hobson v. Todd*, 4 T. R. 71; *Pindar v. Wadsworth*, 2 East, 165; *Williams v. Morland*, 2 Barn. & Cress. 916; *Bronge v. More*, Styles, 428.

³ *Perley v. Chandler*, 6 Mass. 454; *Jackson v. Hathaway*, 15 Johns. (N.Y.) 447; *Holden v. Shattuck*, 34 Vt. 336; *Jackson v. Wilkinson*, 3 B. & Cr. 413.

⁴ *Perley v. Chandler*, 6 Mass. 454.

⁵ *Hunt v. Rich*, 38 Me. 195; *Ruggles v. Leoure*, 24 Pick. (Mass.) 187; *Adams v. Rivers*, 1 Barb. (N. Y. S. C.) 390, where it was held that the owner of the fee might maintain trespass against

Therefore, he may maintain a private action for any illegal obstruction thereof placed upon any part of a street in which he owns the fee. This right has been recognized in numerous well-considered cases decided in the courts of this country, and is sustained by well-recognized principles.¹

SEC. 671. If a man sustains a personal injury, or an injury to his property from an obstruction in a highway being himself in the exercise of due care, he may maintain an action therefor against the person creating it.²

SEC. 672. So if by reason of an obstruction in a highway and being compelled to go a circuitous route, he fails in the performance of a legal duty, or sustains damage by being unable to perform a contract,³ or if by reason of an obstruction he sustains particular damage in the labor of himself or his servants in removing the obstruction.⁴ So if there be but one highway leading to a person's premises and it is obstructed so that customers cannot come to his inn, or to buy his wares, or whereby he is deprived of free access to his premises, an action will lie.⁵

SEC. 673. So also, if by reason of an obstruction in a highway people are turned aside over one's lands whereby his crops are injured,⁶ and the party so sustaining damage may have his action against the person erecting the obstruction for all the damage, upon the principle that every man is answerable for all the probable or natural consequences of his wrongful act.

SEC. 674. Mere delay in a journey, or being turned aside and compelled to take a circuitous route, or mere loss of a journey

a person standing upon the walk in front of his premises using abusive language toward him. He stood there about five minutes. The doctrine of this case however may fairly be questioned, and is contrary to the principles enunciated in a large class of cases. See *O'Linda v. Lathrop*, 21 Pick. (Mass.) 292.

¹ *Davis v. Mayor, etc.*, 12 N. Y. 506; *Williams v. R. R. Co.*, 16 id. 97; *Babcock v. Lamb*, 1 Cow. (N. Y.) 238; *Tucker v. Eldred*, 6 R. I. 404; *Chess v. Manown*, 3 Watts. 219.

² *Bendlones v. Kemp*, cited in *Cro. Eliz.* 664; *Fowler v. Sanders*, *Cro. Jac.* 446; *Butterfield v. Forrester*, 11 East, 60.

³ *Lansing v. Smith*, 8 Cow. 162; *Greasley v. Codling*, *Bing.* 263.

⁴ *Rose v. Miles*, 4 M. & S. 101; *Pierce v. Dart*, 7 Cow. (N. Y.) 609; *Hart v. Bassett*, T. Jones, 156; *Chichester v. Lethbridge*, Willes, 73; *Hughes v. Heiser*, 1 Binney (Penn.), 463.

⁵ *Rose v. Groves*, 1 L. R. C. B. 781.

⁶ *Maynell v. Saltmarsh*, 1 Keble, 847.

by reason of an obstruction, unattended by any special damage, is not sufficient to support an action, because it is a part of the common injury, and similar to that borne by all who attempt to pass.¹ But if a person is stopped upon a highway by an obstruction placed there by some person to prejudice him simply, and is removed for others to pass, and is only an obstruction as to him, this is a special damage.²

SEC. 675. If a highway is acquired by the public by dedication, and the plaintiff or his grantors has had a way over it to and from his premises prior to its adoption as a highway, it has been held that any obstruction thereof, after it becomes a highway, is a special injury to a private right of all those who had previously used it as a way, and that their private rights therein were not lost by its acceptance as a highway by the public, but that the public took it as a highway charged with these private rights of way, so that an obstruction thereof is a private injury to them, such as will enable them to maintain an action, and this position would seem to be sustained by the principles announced in many modern cases entitled to weight as authorities.³

SEC. 676. It should perhaps be stated that for personal injuries sustained by a person by reason of any nuisance in a highway, or injuries thereby inflicted upon his team or property, the person creating the nuisance, as well as the person maintaining it, is always liable in a civil action, if the person injured was in the exercise of ordinary care when the injury was inflicted, and no degree of care on the part of the person erecting or maintaining the nuisance, will exempt him from liability. The act is a wrongful one, and he is answerable for all the consequences that flow

¹ *Paine v. Patrich*, Carth. 191; *Fin-eux v. Hovenden*, Cro. Eliz. 664; although in this case the judgment was by a divided court. *CLENCH, J.*, holding that the stopping itself was a special damage to the plaintiff.

² See Lord *HOLT's* opinion in *Iveson v. Moore*, *Ld. Rayd.* 486.

³ *Allen v. Ormond*, 8 East, 4; *Fisher v. Prowse*, 31 L. J. Q. B. 219; *Cornwall*

v. Metropolitan Sewers, 10 Exchq. 771; *Mercer v. Woodgate*, L. R. 5 Q. B. 26; *Robbins v. Jones*, 33 L. J. C. P. 1; *Morant v. Chamberlain*, 30 Law J. 299; *Le Neve v. Mile End Vestry*, 8 El. & Bl. 1063; *Arnold v. Becker*, L. R. 6 Q. B. 433; *Parker v. Framingham*, 8 Met. (Mass.) 260; *Smyles v. Hasting*, 22 N. Y. 217.

therefrom, to a person who is not chargeable with negligence by reason of which the injury is inflicted.¹

CHAPTER NINETEENTH.

POLLUTION OF WATER.

SEC. 677. Right to water in its natural state.

678. The same right exists in fresh water navigable streams.

679. No distinction as to the cause of the pollution.

680. Distinction where the owner of the banks does not own the shore.

681. Rule in *Conservators, etc., v. Kingston*.

682. Slight pollution not actionable.

683. Stream having been devoted to secondary uses, does not warrant an increase of pollution.

684. Public convenience no excuse.

685. Difficulty and expense of obviating no excuse.

686. Distance from which offensive matter comes of no account.

687. Rule in *Stockport Water-works Co. v. Potter*.

688. Excess of user above prescriptive right.

689. Right of prescription must not be exceeded.

690. Appreciable increase requisite, when.

691. When pollution will be enjoined.

692. Actual damage not necessary.

693. Erection of cess-pools near wells.

694. Must violate primary or secondary right, distinction between.

695. What are primary uses.

696. Artificial water-courses, pollution of.

697. *Potter v. Froment*.

698. Rendering water stagnant.

699. *Brown v. Russell*.

700. Injuries to secondary uses.

SEC. 677. The right of a riparian owner to have the water of a stream come to him in its natural purity is as well recognized as the right to have it flow to his land in its usual flow and volume.²

¹ *Jones v. Chantry*, 4 N. Y. Sup. Ct. Rep. (Pars. Ed.) 63; *Chicago v. Robins*, 2 Black. (U. S. S. C.) 280.

² *Wood v. Sutcliffe*, 16 Jur. 75; 8 Eng. Law & Eq. 217; *Stockport Water-works Co. v. Potter*, 7 H. & N. 159.

But in reference to this, as with the air, it is not every interference with the water that imparts impurities thereto, that is actionable,¹ but only such as imparts to the water such impurities as substantially impair its value for the ordinary purposes of life, and render it measurably unfit for domestic purposes,² or such as cause unwholesome or offensive vapors or odors to arise from the water, and thus impair the comfortable or beneficial enjoyment of property in its vicinity,³ or such as, while producing no actually sensible effect upon the water, are yet of a character calculated to disgust the senses, such as the deposit of the carcasses of dead animals therein,⁴ or the erection of privies over a stream,⁵ or any other use calculated to produce nausea or disgust in those using the water for the ordinary purposes of life,⁶ or such as impair its value for manufacturing purposes.⁷

SEC. 678. It is a well-settled rule of law that in order to constitute the pollution of water a nuisance, it must be shown to be such as to operate as a violation of some right, either primary or secondary. The mere fact that it produces inconvenience is not sufficient. It must be of such a character and to such an extent as to operate as an actual invasion of a right.* The fact that the stream is a navigable stream, if non-tidal, does not prevent a recovery by an individual for an injury resulting to him from its pollution, for riparian owners upon such streams, as well as the public generally, have a right to use the waters of a navigable

¹ Attorney-General v. Gee, 10 L. R. (Eq. Cas.) 131.

² Millar v. Marshall, 5 Mur. (Sc.) 28.

³ Goldsmid v. Tunbridge Wells Imp. Co., 1 L. R. Ch. App. 349.

⁴ Vedder v. Vedder, 1 Denio (N. J.), 257.

⁵ Norton v. Schofield, 9 M. & W. 663.

⁶ Vedder v. Vedder, ante, placing a dead dog in a stream.

⁷ Carhart v. Auburn Gas-light Co., 23 Barb. (N. Y.) 444.

* In Lillywhite v. Trimmer, 16 L. T. (N. S.) 318, the plaintiff was the owner of a mill upon a stream, and the defendant, who was clerk of the board of health of the town, had caused a sewer to be built which was discharged into the stream. The plaintiff claimed that the water had previously been

pure and fit for primary use, but the sewage matter discharged into it, killed the trout, and occasioned offensive and unwholesome smells. The water of the stream, although fit for primary uses previously to the erection of the sewer, had never been used for that purpose, and as the other allegations of the complaint were not proved, the court refused to interfere by injunction. In Russell v. Haig, 3 Pat. App. (Sc.) 403, the defendant, who was a distiller, discharged the dregs from his distillery into a stream flowing through the plaintiff's premises, thereby polluting the water. The court held that unless the stream had for twenty years been burdened with the servitude, the discharge of such refuse there was unlawful.

stream for domestic purposes, and the pollution of such streams, except such as is necessarily incident to their uses for the purposes of navigation, so as to impair their value for primary uses, is as much a nuisance and actionable as though it was not navigable.¹ And the fact that the water of such a stream has been polluted in a similar way for more than twenty years, does not confer a prescriptive right to continue it, particularly when the nuisance results from the *increase* of the pollution. But in order to make out a case of nuisance under such circumstances, the injury complained of must be to us a substantial right, and must result from artificial causes and from an actual increase of the pollution.²

SEW. 679. It is a matter of no importance so far as the question of liability is concerned, whether the pollution arises from private works or from the drainage of towns into the stream under legislative authority. If the water of a navigable stream in which the tide does not ebb and flow, is adapted to domestic use, the legislature has not the power to authorize its use in such a way as to destroy its use by riparian owners for such purposes, without compensation, and any authority of that character will be utterly inoperative as a defense to a suit by a riparian owner injured thereby.³ But the rule is different when the water has been given over to secondary uses entirely. Thus in *Merrifield v. Worcester*, 110 Mass. 216, it was held that where the water of a stream given up to secondary uses was rendered less fit for manufacturing purposes by reason of the discharge of the sew-

¹ *Conservators of the River Thames v. The Mayor of Kingston*, 12 L. T. (N. S.) 667, in which it was held that the discharge of sewage from a town into the river Thames so as to render it unfit for domestic uses, was a nuisance. In *Watson v. The City of Toronto Gas-light and Water Co.*, 4 Upper Canada Rep. 158, the court say that "the right which an individual has to the water of a public navigable stream in its pure state, is not founded on his ownership of land, or of a mill or house adjoining the water, but simply upon the same common-law right which every other individual has to use the water in its pure, unadulterated state. A person throwing offensive matter into a navigable stream is liable, not

only to indictment but to any individual particularly injured thereby. *Wilts v. Navigation Co.*, 9 L. R. Ch. 451; *City of Philadelphia v. Collins*, 68 Penn. St. 120; *Gilmartin v. Philadelphia*, 71 Penn. St. 140.

² *Duke of Buccleugh v. Coman*, 5 Macph. (Sc.) 214; 39 Jur. 152; *Robertson v. Stewart, G. & M.* (Sc.) 189; *Millar v. Marshall*, 5 Mur. (Sc.) 28; *Holsman v. Boiling Springs Bleaching Co.*, 14 N. J. 335.

³ *Conservators of the River Thames v. The Mayor of Kingston*, 12 L. T. (N. S.) 667; *Carhart v. Auburn Gas-light Co.*, 23 Barb. (N. Y.) 222; *Dunn v. Hamilton*, 2 S. & McK. (Sc.) 356; *Hudson R. R. Co. v. Loeb*, 7 Robt. (N. Y.) 248.

age of a city therein, no recovery could be had, unless the injury arose from the faulty construction of the sewer itself.

SEC. 680. There are cases decided in the courts of this country, in which the doctrine is advanced, that a riparian owner upon a navigable stream in which the tide ebbs and flows has no special right or interest in the waters of such streams,¹ but it may be said that these cases are not applicable to fresh water streams in which, although navigable, the riparian owners own the bed of the stream.²

SEC. 681. In a case in the English courts, *Conservators of the River Thames v. The Mayor of Kingston*, 12 Law Times (N. S.), 667, the court passed upon this very question. "Riparian owners and the public have the right to take water from navigable streams," says the court, "and the pollution of such water, so as to destroy their value for *primary* purposes by leading into the same the sewage of the town, is a nuisance, and" adds the court, "the fact that sewage has been sent there for many years does not give a prescriptive right to continue it when, *by the increase therein*, it becomes a nuisance."³

SEC. 682. The rule seems to be, that any pollution of the water of a stream that impairs its value for domestic uses is a nuisance, and actionable as such, but it must not by this be understood that every pollution of the water of a stream is actionable. Slight pollution arising from the use of a stream, which does not essentially impair its value, is not actionable. Lord ARMTAGE in *Robertson v. Stewart*, 9 G. & M. (Sc.) 189, thus laid down the rule applicable to this class of injuries: "It is not every slight

¹ Gould v. Hudson R. R. Co., 6 N. Y. 532, in which it was held that a riparian owner on the banks of the Hudson river, within the ebb and flow of the tides, had no such rights in the stream, that the legislature could not divest him of without compensation. Railroad Co. v. Stevens, 34 N. J. 532; 3 Am. Rep. 269; Tomlin v. Dubuque, 32 Iowa 106; 7 Am. Rep. 176.

² Conservator of the River Thames v. Mayor of Kingston 12 L. T. (N. S.)

667; Buccleugh v. Metropolitan Board of Works, 5 H. L. Cas. 418. See note to Tomlin v. Dubuque, 7 Am. Rep. 176; Chapman v. Oshkosh Railroad Co., 33 Wis. 629; Yates v. Milwaukee, 10 Wal. (U. S. S. C.) 497; Bowman's Devises v. Watham, 2 McLean (C. C. U. S.), 376; Turner v. Blodgett, 5 Met. (Mass.) 246. See Chapter on Navigable Streams.

³ Sutcliffe v. Wood, 8 Eng. Law & Eq. 217.

pollution of the waters of a stream, nor every disagreeable odor that is to be dealt with as a nuisance and put down by the authority of the law. The abatement of a nuisance does not necessarily mean the entire and absolute removal of *all* pollution of a stream, and *all* disagreeable odor, but such diminution of pollution and of smell as to render it such as ought fairly and reasonably to be submitted to." Thus it will be seen that slight injuries to the water of a stream resulting from a reasonable use of it must be borne, if the value of the water for domestic uses is not thereby essentially impaired.

SEC. 683. Where the water of a stream has been in a measure given over to uses which have destroyed its value for culinary purposes, yet this does not warrant an increase of pollution whereby its value for other domestic purposes, such as watering cattle and cutting ice for domestic use, is destroyed or even seriously impaired.¹ In the case referred to in the note it appeared that the plaintiff was tenant for life of an estate called *Somerhill*, near *Tunbridge Wells*. The estate had upon it a mansion house where the plaintiff resided and a park in which was a lake or large pond used for watering cattle, and in the winter for supplying ice for domestic use. The lake was fed by *Calverley Brook* which ran through *Tunbridge Wells* and after passing through *Colebrook Park* flowed about two miles and a-half through the plaintiff's land. The defendants were commissioners under an act for lighting, cleaning and improving the town of *Tunbridge Wells*, which gave full powers to drain the town, to make sewers and to turn any drain or sewer into any common ditch or water-course. The sewage of the town of *Tunbridge Wells* was discharged into *Calverley Brook* and had been so discharged there for several years, but the town had been constantly growing and thus the amount of sewage had been constantly increasing, so that at the time when the action was brought, the water in the plaintiff's lake which, up to within a short period, had been fit for domestic uses of all kinds, had become unfit even for the purpose of watering cattle or furnishing ice for domestic use. The court held that

¹ *Goldsmid v. Tunbridge Wells Impr. Co.*, 1 L. R. Ch. App. 349, affirming judgment of the Master of the Rolls, 1 L. R. Eq. Cas. 161; *Attorney-General v. Leeds*, 5 L. R. Ch. App. 583.

the discharge of the sewage of the town into the brook, with the result stated, was a violation of the plaintiff's right and a nuisance, and the defendants were restrained from continuing it.

SEC. 684. The fact that the public convenience,¹ or that the preservation of public health even requires that the sewage of a town shall be removed, and that there is no other method by which it can be disposed of except to discharge it into a running stream, will not justify its discharge there to the injury of riparian owners. And the fact that the population of the town is large, and the number of persons to be affected by the nuisance are few, makes no difference. In the language of JAMES, V. C., in *Attorney-General v. Leeds*, 5 L. R. Ch. App. 589: "The court cannot say that the small population along the valley of the *Aire*, between *Leeds*, has not a right to prevent a nuisance from being inflicted upon them by a large and more populous district. I think they (*Leeds*) will find means of removing the sewage without the danger to health that has been suggested, *but at all events* I think the people below the town have a right to say that a nuisance must not be created for them.

SEC. 685. Neither does it make any difference or in any measure operate as an excuse that the nuisance cannot be obviated without great expense, or that the plaintiff himself could obviate the injury at a trifling expense. It is the duty of every person or public body to prevent a nuisance, and the fact that the person injured could, but does not, prevent damages to his property therefrom, is no defense either to an action at law or in equity. A party is not bound to expend a dollar, or to do any act to secure for himself the exercise or enjoyment of a legal right of which he is deprived by reason of the wrongful acts of another.² Neither is it any defense to an action for a nuisance resulting from the pollution of water or otherwise that other persons are also contributing to the injury in the same way with the defendant. The fact that others are committing a wrongful act is no

¹ *Attorney-General v. Colney Hatch Lunatic Asylum*, 4 L. R. Ch. App. 147; *Attorney-General v. Leeds*, 5 id. 589.

² *Attorney-General v. Colney Hatch Lunatic Asylum*, 4 L. R. Ch. App. 147

excuse for another's wrong. It may, in a proper case, be shown in mitigation of damages but not to defeat the action.¹

SEC. 686. It is of no importance in determining the question of nuisance by the pollution of water, whether the works or causes producing it are near to or far removed from the premises of the person complaining, the simple question is, whether the water coming to the plaintiff's premises is impaired in value for the ordinary uses of life, or for special lawful uses, by reason of any foreign substance imparted thereto by another from artificial causes, and whether such impurities arise from the acts of the defendant or his agents.² The burden of establishing both these propositions is always upon the party complaining,³ but when once established the nuisance is made out, and the right of recovery cannot be defeated otherwise than by the establishment of a right by grant or prescription,⁴ or by an express license from the plaintiff.⁵ The usefulness of the works, their absolute necessity, nor the fact that they cannot be carried on without producing the result in question, nor the fact that the highest degree of care and skill is exercised to prevent injury will be no excuse.

SEC. 687. In *Stockport Water-works Co. v. Potter* these questions were considered and passed upon by the court. In that case it appeared that the plaintiffs, under lawful authority, took water from the river Mersey to supply the inhabitants of the town of Stockport with water. The defendants were calico printers and had their works upon a brook that flowed into the river. Their works were located about eleven miles from the point where the plaintiffs took the water from the stream. In the process of printing calico, large quantities of arsenic are used and all this is washed into the stream, none being left in the calico. The water below

¹ Crossley & Sons, limited, v. Lightowler, 3 L. R. Eq. Cas. 279; Holsman v. Boiling Spring, etc., Co., 14 N.J. 314; McKeon v. See, 51 N. Y. 300. See opinion of ROBERTSON, J., 4 Rob. (N. Y.) 469 and 470; Wood v. Wand, 3 Ex. 748.

² Norton v. Schofield, M. & W. 663.

³ Dawson v. Moore, 8 C. & P. 25.

⁴ Miller v. Marshall, 5 Mur. (Sc.) 32;

Hayes v. Waldron, 44 N. H. 585; Moore v. Webb, 1 C. B. (N. S.) 673; Jones v. Crow, 32 Penn. St. 393; Merrifield v. Lombard, 13 Allen (Mass.), 16; Murgatroy v. Robinson, 8 E. & B. 391.

⁵ Carlyon v. Lovering, 1 H. & N. 784.

⁶ Attorney-General v. Birmingham, 4 K. & J. 528; Stockport Water-works Co. v. Potter, 7 H. & N. 159.

the outlet of the plaintiffs' works, and eleven miles distant therefrom, was analyzed, and arsenic to the amount of six grains to each gallon of water was found. The fish in the river were killed. In mud taken from the plaintiffs' reservoir, arsenic was found in the proportion of 4.6 grains of arsenic to one pound of mud. The judge submitted ten questions to the jury, the eighth, ninth and tenth of which were as follows: Eighth. Was the discharge of the water from the defendants' works with noxious matter, causing damage to the plaintiffs, necessary and unavoidable, or might the same have been avoided by them by using reasonable care, that is, not by any extravagant outlay as such a business requires? Ninth. Has the defendants by discharging matters into the stream occasioned injury to the plaintiffs in excess of the rights exercised by them for twenty years, before the discharge of the matters complained of? Tenth. Was the defendants' trade a lawful trade, carried on for purposes necessary or useful to the community, and carried on in a reasonable and proper manner and in a reasonable and proper place? The jury to the eighth question returned that they knew of no means by which the pollution could be avoided. The ninth and tenth questions were answered in the affirmative. Upon these findings a verdict was directed for the plaintiffs, which was sustained upon hearing in Exchequer.

SEC. 688. While it is true that one may, by twenty years' user in a particular manner, acquire the right to pollute the water of a stream, yet, for any *appreciable* excess of such continuous user, an action lies.¹ The right is measured by the user, and while a trifling or accidental increase, not operating to the damage of others, or made under a claim of right, will not be regarded as actionable, yet any *sensible* or *appreciable* increase is a nuisance and actionable or indictable as such.² But the use may be changed

¹ Crossley v. Lightowler, 3 L. R. Eq. Ca. 279; 2 L. R. Ch. App. 478; Murgatroyd v. Robinson, 8 E. & B. 391; Hayes v. Waldron, 44 N. H. 585; Jones v. Crow, 32 Penn. St. 393; Moore v. Webb, 1 C. B. (N. S.) 673; Millar v. Marshall, 5 Mur. (Sc.) 32; Carlyon v. Lovering, 1 H. & N. 784; Lewis v. Stein, 16 Ala. 214. Charge of WESTBROOK, J., in nisi prius case at Albany Circuit, February, 1875, in Orphan Asylum v. Schwartz.

² Crossley v. Lightowler, 3 L. R. Eq. Ca. 279; 2 L. R. Ch. App. 478. In Goldsmid v. Tunbridge Wells Imp. Co., 1 L. R. Ch. App. 349, the plaintiff had an injunction to restrain the discharge of the sewage of a town into a stream that ran through his premises because of the increase in the pollution of the water, arising from an increase of the sewage, in consequence of the increase in the population of the town.

provided the change in use does not increase the pollution, or produce other or different damage from that under which the right has been acquired. Thus it was held that where one had acquired the right to pollute a stream with the refuse of a paper mill, arising from the washing of dirty rags, he was not restricted to the discharge of refuse from the mill arising from the washing of rags, but might use any material in the manufacture of paper and discharge the refuse into the stream, provided the nuisance was not increased, and that the burden of proving an increase is upon him who alleges it.¹

SEC. 689. It is no answer to an action or indictment for a nuisance to show that a great many others are committing the same species of nuisance upon the stream, and that the plaintiff will get no material relief from the stopping of the defendant's works, if the defendant's works *appreciably* add to the pollution, they are a nuisance, even though the water has been given over to noxious uses for more than twenty years by others, for, while one may submit to one nuisance until it has imposed a servitude upon his estate, yet he is not thereby precluded from preventing another from acquiring a similar servitude. If the nuisance is sensibly or appreciably increased by the defendant, his use of the stream is a nuisance, and he must yield to the superior rights of others.²

SEC. 690. As it is necessary in order to make out a nuisance against one who discharges refuse into a stream that has already been given over to secondary uses and is measurably polluted thereby, to show that the use made by him of the stream *appreciably* increases the pollution, it follows that when such *appreciable* increase is found to be made by the defendant's works, that a nuisance is thereby established and the plaintiff is entitled to have the use enjoined, even though no actual damage results to him, unless the injury is occasional, rather than continuous, and is properly compensable in a suit at law.³

¹ Baxendale v. McMurray, 2 L. R. Ch. App. 740.

² Crossley v. Lightowler, 3 L. R. Eq. Ca. 279; Tipping v. St. Helen Smelting Co., 11 H. L. Cas. 642; Walter v. Selfe, 4 Eng. Law & Eq. 15.

³ Goldsmid v. Tunbridge Wells Co., 1 L. R. Ch. App. 349; Sutcliffe v. Wood, 8 Eng. Law & Eq. 227; Lingwood v. Stowmarket Co., 1 L. R. Eq. Co. 77; Clowes v. Staffordshire Potteries Co., 8 L. R. Ch. App. 125. The Vice-Chan-

SEC. 691. The rule is, that when a right is violated the law will import damage to sustain the right,¹ and when the violation of the right is continuous, so as to operate as a constantly recurring grievance, and when an injunction will *tend* to restore the plaintiff to his former position, an injunction will be granted to restrain the nuisance even though no *actual* damage ensues.² The rule is, that if a nuisance is found by a verdict at law, or by the court itself, the wrongful act will be restrained. It would be an absurdity to refuse an injunction under the established rules, when a continuous nuisance is found to exist upon the ground that no actual damage ensues. If an *appreciable* violation of a right is found to exist, the cessation of the exercise of the use that works the violation, must certainly *tend* to restore the plaintiff to his former condition in reference thereto, within the rule as adopted in *Wood v. Sutcliffe*, 8 Eng. Law & Eq. 217. The doctrine that where the injury to a right even though no actual damage ensues therefrom, an action will lie, is well established. Indeed nominal damages will be inferred to support the right.³

cellor having refused an injunction upon the ground that the injury was trifling, Sir G. J. MELLISH, L. J., said: "The Vice-Chancellor said: 'If you can recover at all at law, I think you would get no greater damages than to pay for a filter.' But, with due submission to the Vice-Chancellor, I do not think he would get *enough* at law to pay for a filter. She would only get nominal damages because, in a case of this kind, you cannot prove specific damages. Then you must bring a second action, and what you would get in the second action would be *actual* damages, which you proved you sustained between the time you brought the first action and the second. Then you would bring a third action and you would get, as damages, the damage you sustained between the bringing of the second action and the third. It is because it is always most inconvenient to leave parties to have their rights determined in this way, and in fact *impossible* to leave it in that way, that this court has always, in such cases, given relief. In my opinion, therefore, the plaintiff is entitled to maintain this action, and that

the acts of parliament have not given the defendants any right to foul the water to her damage, and she ought to have an injunction to prevent any such damage in future."

¹ *Ashby v. White*, 2 Ld. Rayd. 1028, notes thereto; 1 Smith's Lead. Ca. 364, in which the annotator, gives the real test for determining when an action will lie. *Phear on Waters*, 107.

² *Wilts v. Swinton Water-works*, 9 L. R. Ch. 451; *Goodson v. Richardson*, 9 id. 224.

³ Note to *Ashby v. White*, 1 Smith's Lead. Ca. 364; *Phear on Water*, 107; *Chasemore v. Richards*, 5 H. & N. 982; *Bower v. Hill*, 1 Bing. (N. C.) 549; *Howell v. McCoy*, 3 Rawle (Penn.), 256; *Pugh v. Wheeler*, Dev. & Bat. 50; *Crossley v. Lightowler*, 3 L. R. Eq. Ca. 297; *Chapman v. Thames Mfg. Co.*, 13 Conn. 269; *Woodman v. Tufts*, 9 N.H. 88; *Hulme v. Shrieve*, 3 Green (N. J.), 116; *Webb v. Portland Mfg. Co.*, 3 Sumner, (N. S.) 189; *Bolivar Mfg. Co. v. Neponset Mfg. Co.*, 16 Pick. (Mass.) 241; *Plumleigh v. Dawson*, 1 Gil. (Ill.) 551; *Goldsmid v. Tunbridge Wells, etc.*, L. R. Eq. Ca. ; *Crocker v. Bragg*, 10 Wend. (N. Y.) 260; *Baldwin v. Cal-*

SEC. 692. It is no answer to an action for a nuisance arising from the pollution of water, to say that the matter discharged into the stream improves the water, it is the right of every person to have the water come to them in its natural state, and they are to exercise their own taste and judgment and are not obliged even to have their property improved against their will.¹

If the water of a stream is polluted sufficiently to occasion *legal* damage, though not damage in fact, it is sufficient to maintain an action.² By legal damage, is meant a legal injury resulting from the violation of a right which is not attended with actual pecuniary damage.

Therefore, when water is so far polluted as to injure its primary use, although it is not used for that purpose, an actionable injury is created.³ So when the use of water renders it injurious to health or impairs the comfortable enjoyment of property, a nuisance is created, actionable at the suit of all persons specially injured thereby, and indictable if the stream is public or the injury common.⁴

SEC. 693. The erection of a cess-pool near a well so as to injure the water therein and impair its value for primary use is an actionable nuisance, and it would seem that any noxious trade carried on upon adjoining premises, which impregnates the earth

kins, id. 167; Ripka v. Sargent, 7 Watts & S. (Penn.) 11; Munroe v. Stickney, 48 Me. 462. See Elliott v. Fitchburgh R. R. Co., 10 Cush. (Mass.) 191, for exceptional instances; also Slate Co. v. Adams et al., 46 Vt. 480, where an injunction was refused upon demurrer to the bill on the ground that the bill did not allege the injury to be continuous or irreparable. Sir G. J. TURNER, in Goldsmid v. Tunbridge Wells Impt. Co., 1 L. R. Ch. App. 354, says: "I adhere to the opinion which was expressed by me in Attorney-General v. Sheffield Gas Co., 3 D. G., M. & G. 304; 19 Eng. Law & Eq. 671, that it is not in every case of nuisance that this court should interfere. I think it ought not to do so in cases in which the injury is *merely temporary and trifling*; but I think that it ought to do so in cases in which the injury is *permanent and serious*, and in determin-

ing whether the injury is serious or not, regard must be had to all the consequences which may flow from it."

¹ Holsman v. Boiling Spring Co., 14 N. J. 334.

² Stockport Water-works Co. v. Potter, 7 H. & N. 730; Wheatley v. Chrisman, 24 Penn. St. 298; Wood v. Waud, 3 Exchq. 748; Lombard v. Allen, 13 Allen (Mass.), 16.

³ Holsman v. Boiling Spring Co., 14 N. J. 334; Attorney-General v. Steward, 5 C. E. Green (N. J.), 415; Lewis v. Stein, 16 Ala. 214.

⁴ Story v. Hammond, 4 Ohio, 833; Mills v. Hall, 9 Wend. 315; Mayo v. Turner, 1 Munf. (Va.) 405; People v. Townsend, 3 Hill (N. Y.), 479; State v. Stoughton, 5 Wis. 291; Carhart v. Auburn Gas-light Co., 22 Barb. (N. Y.) 297; Harris v. Thompson, 9 Barb. (N. Y.) 350; Lewis v. Stein, 16 Ala. 214; Stein v. Burden, 24 id. 130.

with noxious matter that destroys the water of a well, is equally actionable.¹

SEC. 694. The rule in reference to injuries arising from the pollution of water, seems to be that, in order to constitute the pollution a nuisance it must be shown to be such as violates some right either *primary* or *secondary*. The mere fact that inconvenience is produced is not sufficient. It must be an actual invasion of a right, and must, in order to constitute an invasion of a legal right, work an *appreciable* change in the quality or character of the water. And this is particularly the case when the nuisance complained of is in a navigable stream. The public have a right to take water from a navigable stream for domestic use, and the pollution of such waters so as to destroy their value for primary purposes, by leading into them the sewage of a town or placing therein any noxious matter except such as is incident to navigation, is a nuisance, and the fact that sewage has been sent there for more than 20 years, or the usual prescriptive period, does not give a prescriptive right to continue it, when, by the *increase* thereof, it becomes a nuisance.² But if the water has been given up to secondary uses, so as to be wholly unfit for primary use, the riparian owners cannot predicate a claim for damages upon the ground that it might be used for some extraordinary purpose to which it has never been applied, and to which they have no present intention to apply it.³ If the matter discharged into a stream impregnates it with artificial impurities, injurious to its primary use, a nuisance is thereby created, unless the party thus putting it there has acquired the prescriptive

¹ Scholfield v. Norton, 9 M. & W. 565. In Wormersley v. Church, 17 L. T. (N. S.) 190, the plaintiff and one of the defendants owned adjoining property. There was upon the plaintiff's premises a dwelling occupied by thirteen persons, and there was a well sunk to the depth of sixty feet. There was a cess-pool on the defendant's premises fifteen feet deep. Up to March, 1860, the water in the well was good and fit for domestic use. In that month the defendant began to deepen his cess-pool against the plaintiff's remonstrance, and sunk it 47 feet within 13 feet of the level of the water in

the well. The cess-pool was located some 14 yards from the well. There was a cemetery near the property, some 51 yards distant, but this did not affect the water in the well. An injunction was granted restraining the defendant from using the cess-pool or permitting it to be used. Ottawa Gas Co. v. Thompson, 39 Ill. 601; Brown v. Illius, 25 Conn. 538.

² Conservators of the River Thames v. The Mayor of Kingston, 12 L. T. (N. S.) 667.

³ Dunn v. Hamilton, 2 S. & McL. (Sc.) 356.

right to do so, and though other similar establishments exist upon the stream, yet it is sufficient to show that *his* works contribute appreciably or sensibly thereto.¹ In a Scotch case,² in which an injunction was sought to restrain the defendants from manufacturing farina or starch in such a way as to pollute the water of the stream flowing through the plaintiff's land, it appeared that the defendant's works were carried on in such a way that the earth, dirt and noxious or deleterious matter resulting from, or used in the manufacture, was carried into the stream and polluted it to such an extent as seriously to impair its value. The defendant claimed that no recovery could be had because the water had from time immemorial been given up to secondary uses, also that he himself had used the water in this way for several years, also because he had not polluted the water beyond what it had before been polluted; and, lastly, because the plaintiff had acquiesced in his operations he was estopped from maintaining an action. The Lord ORDINARY having found that the defendant's works caused such a pollution of the water as to be a nuisance both by offensive smells emitted therefrom and by the refuse discharged into the stream; that the stream was wholly given up to secondary purposes; but that it had not for the prescriptive period been given up to secondary uses, so as to unfit it for primary use; an injunction was granted restraining the defendant from using the stream in any of the modes named. Lord ARMITAGE said: "There are some nuisances so serious, so intolerable, so plainly beyond the reach of hope of reform, that there is no doubt, and no alternative. An establishment which by its situation, or products, not protected by prescription, produces an addition to the pollution of a stream already devoted to manufacturing purposes, must be put an end to. The law absolutely forbids it. But sometimes, a case occurs, where, in the course of a manufacture not in itself unlawful, a nuisance has arisen, which, although sufficiently offensive to entitle a neighbor to complain, is not necessarily and at all times a nuisance, but to which mitigation or alleviation may be given by the skill and exertions of the manufacturer, and there well may be conceived a case, where the ends of justice and

¹ *Duke of Buccleuch v. Coman*, 39 Jurist, 152.

² *Robertson v. Stewart*, 9 G. & M. (Cs.) 189.

the reasonable rights and interests of a plaintiff would be sufficiently protected, by such mitigation and alleviation, reducing the injury to a point where the interposition of the law is not necessary. It is not every slight pollution of a stream, nor every disagreeable odor, that is to be dealt with as a nuisance and put down by authority of law. The abatement of a nuisance does not necessarily mean the entire and absolute removal of *all* pollution of a stream, and *all* disagreeable odor, but such diminution of pollution, and of smell, as to render it such as ought reasonably and fairly to be submitted to."

SEC. 695. It should, perhaps, be stated, that the *primary* use of water includes its use for *all* domestic purposes, including as well its use for man or beast; and while water may, for an immemorial period, have been so polluted as to be unfit for culinary purposes, yet if it has not been so much polluted as to unfit it for use in watering cattle, an increase of pollution unfitting it for that purpose is a nuisance, and actionable as such. This question was raised and decided in *Moore v. Webb*, 1 C. B. (N. S.) 671. In that case the defendant was the owner of a tannery upon a stream running through the plaintiff's premises, into which he discharged the refuse from his works. The plaintiff brought an action against him therefor, and alleged as special injury that the discharge of this refuse into the stream polluted it to such an extent that his cattle would not drink the water. The defendant replied, setting up an immemorial right in himself and his grantors to pollute the water. The plaintiff now assigned "that he sued not only for the grievances in the pleas admitted, and attempted to be justified, but for that the defendant committed the grievance *over and above* what the defense justified. Upon proof that the defendants had, within twelve years, greatly enlarged their works, and that previous to that time the water was drank by cattle, and was fit for that purpose, it was held that the plaintiff was entitled to a recovery.

SEC. 696. The pollution of the water of an artificial water-course, to the use of the water of which, in a pure state, a right has been acquired by prescription, is an actionable nuisance.¹

¹ *Major v. Chadwick*, 11 Ad. & El. 371. See chapter on Artificial Water-courses.

SEC. 697. In a recent case in California, the defendant was held chargeable for a nuisance under the following state of facts. The defendant erected a saw-mill upon a stream running through the plaintiff's premises, and was engaged in sawing a species of timber called red wood. The saw dust arising from the business was discharged into the stream, rendering the water impure and unfit for domestic use. This was held an actionable injury, but the principal question involved in the case was in reference to the rule of damages. The court held that the plaintiff could only recover actual damages, and that in estimating those, the diminution of their rental value could not be considered, unless it was shown that he had actually sustained damage in this respect, either by diminution in the rent or by being unable to rent them at all, and that, when the plaintiff himself occupied the premises and did not rent, or desire to rent them, the diminution in their rental value could not be shown as an element of damage upon the question of damage by decrease of rental value. See the cases cited below.¹

SEC. 698. The pollution of water, or the maintenance of dams, drains or ditches in such a way as to emit disagreeable or unwholesome odors, is not only an actionable, but an indictable nuisance also. And for such nuisances a remedy exists, not only in favor of the riparian owner, but of any person who is injuriously affected thereby.² In such cases it makes no difference that several contribute to the nuisance; any person materially contributing thereto may be pursued alone for the injury.³

SEC. 699. In *Brown v. Russell*, 3 L. R. (Q. B.) 251, the appel-

¹ *Francis v. Schoellkopf*, 53 N. Y. 154; *Wesson v. Washburn Iron Co.*, 13 Allen (Mass.), 95.

² In *Mills v. Hall*, 9 Wend. (N. Y.) 315, the defendant erected a mill-dam which set the water back upon the premises above, when it accumulated in low places, and becoming stagnant, emitted malarial gases which affected the health of the neighborhood; some of the members of the plaintiff's family became sick thereby, and the court held that he was entitled to recover therefor, and it would seem that

the expenses of sickness and the loss of time incident thereto is a proper element of damage. *Story v. Hammond*, 4 Ohio, 160; *Mayo v. Turner*, 1 Munf. (Va.) 405; *People v. Townsend*, 3 Hill (N. Y.), 479; *Attorney-General v. Steward*, 5 C. E. Green (N. J.), 415; *Rogers v. Barker*, 31 Barb. (N. Y.) 347; *Munson v. The People*, 5 Park. Cr. (N. Y.) 16; *Rooker v. Perkins*, 14 Wis. 79.

³ *Hudson R. R. Co. v. Loeb*, 7 Robt. (N. Y.) 418; *Mayor v. Baumberger*, id. 219.

lant was a brewer, and his premises were in the village of Esher, through which the turnpike road ran to Kingston-on-Thames. The open ditch complained of was proved by the respondent to be a nuisance injurious to health. It was on Ditton marsh by the side of the turnpike road leading from Sandown turnpike gate to Kingston. The ditch commenced close to the turnpike gate (about half a mile from the appellant's premises), and extended thence for some distance along the right-hand side of the turnpike road toward Kingston.

The appellant's premises formerly drained into a sand cave under the garden of one Isaac; about twenty-two years prior to the bringing of this action the drain from the appellant's premises was first made through Isaac's garden to join the barrel drain or sewer; and ever since, up to the time of the complaint, the appellant and his predecessors have discharged their sewage and refuse water from the brewery into this covered barrel drain or sewer, which ran down the turnpike road from the village of Esher toward Kingston, and about 300 yards from the appellant's premises, turned to the right into and upon the Sandown Place estate, whereon it discharged itself into an open ditch or water-course. The owner and occupier of such estate, for many, but not twenty, years, diverted and disposed of the sewage and refuse water by turning or allowing it to run over meadow lands belonging to the estate, for the purpose of irrigating and fertilizing such lands. Such user and disposal of the sewage and refuse water was afterward discontinued by such owner or occupier of the estate, and the sewage or refuse water was then turned by such owner or occupier into and down certain open ditches on the estate, which ultimately emerged from the estate close to the Sandown turnpike gate, where it caused the nuisance complained of. The present owner and occupier of Sandown estate was no party to the sewage being turned on the estate, and he objected to the same being turned on, or allowed to run over his lands.

The course of the drain before it was diverted was down the left side of the turnpike road to the Sandown turnpike gate, and thence to the left to a pond a short distance from the road; but a culvert was proved to have existed close to the turnpike gate, carrying the drainage under the turnpike road

from the left side to the right side, and so into the present open drain complained of, before the drainage was diverted by the occupier of the Sandown estate into his estate.

No nuisance was complained of as arising from the said sewer or drain at any point in its course until after it passed the turnpike gate; but it was proved by the respondent that the offensive matter complained of came from the premises belonging to, and in the occupation of, the appellant, and the other persons summoned, by means of the covered barrel, drain or sewer.

The appellant urged before the justices that, inasmuch as he had by user, as of right, for upward of twenty years of the said drain or sewer, acquired a prescriptive right amounting to an easement to discharge his sewage and refuse water on the Sandown Place estate, and no nuisance arose from the drain or sewer until it left the Sandown Place estate at the turnpike gate, the nuisance complained of arose, not from the act of the appellant in making use of the sewer or drain, but from the act of the owner or occupier of the Sandown Place estate in having (in lieu of using and disposing of the sewage or refuse water as formerly) caused the same to flow down the open ditches on his estate, and so out on to the Ditton marsh by the turnpike road.

The justices decided that they could not regard any private rights between the appellant and the owner of the Sandown estate, and they held that the appellant was the person by whose act or default the nuisance complained of arose, and they made an order requiring the appellant "within one week from the service of the order, or a true copy thereof according to the act, to abate the said nuisance by cutting off all connection between the drains of the said premises belonging to the appellant used for sewage purposes, and the drain or sewer leading to and entering the said ditch or water-course, so that all communication for sewage purposes between the said premises of the appellant and the said ditch or water-course do cease, and so that the same ditch or water-course shall no longer be a nuisance and injurious to health as aforesaid." In disposing of the case, LUSH, J., said: "The appellant discharges this refuse from his brewery by means of a drain, which must carry it to the spot where it causes the nuisance; why is it not his act which creates the nuisance just

as much as if he had discharged the noxious matter on the spot from a cart or by means of a shute? It cannot be said where many houses are drained into one spot that any one causes the nuisance."

SEC. 700. Injuries for the pollution of the water of a stream are by no means confined to such as arise because the value of the water is impaired for *primary* use. It is the right of every person to have the water of a stream come to him in its natural state, unimpaired in quality, whether he desires to use it for domestic purposes or not, and an invasion of this right is actionable, even though he applies the water to no special use, and sustains no special damage therefrom. He does not own the water, it is true, but he has a usufructuary interest therein, which is property in a certain sense, and against the imposition of a servitude upon which he has a right to protect himself by action, even though he sustains no special pecuniary damage. Therefore no person has a right to pollute the water of a running stream unless such a right has been acquired by long user, and any pollution thereof, that interferes with its use for manufacturing purposes, is a nuisance, entitling the person so injured, to all the damages which he sustains thereby.¹

¹ In *Howell v. McCoy*, 3 Rawle (Penn.), 356, the defendant discharged the refuse of his tannery into the stream, whereby the water was rendered unfit for use by the plaintiff in his brewery.

In *Carhart v. Auburn Gas Co.*, 22 Barb. (N. Y.) 297, the plaintiff was a carpet manufacturer on the Owasco river in Auburn. The defendants established their gas-works on the banks of the stream, and the refuse discharged therefrom, consisting of certain tarry and oily substances, became mingled with the water, and injured the wool and other materials used by them in the manufacture of their goods. Held an actionable nuisance.

In *Clowes v. Staffordshire Potteries Water-works Co.*, 8 L. R. Ch. App. 126, the plaintiff was the proprietor of dye-works on the river Churnet, and the defendants established a reservoir for water with which to supply the town. The establishment of the reservoir

rendered the water more muddy than formerly, and impaired its value for use by the plaintiffs. Held an actionable nuisance. In *Hodgkinson v. Ennor*, 3 B. & S. 229, the plaintiff was the proprietor of a paper mill situated in a valley at the foot of a range of hills sloping toward, and terminating in, a tall, precipitous rock abutting against them. Inside this rock, and at a slight elevation, was, and for an immemorial period had been, a cavern formed in the rock, into which the water produced by the fall of rain was collected from the hills above, ran by underground passages, traversing the floor of the cavern in a defined stream, and flowed from the cavern by an underground passage into an open, natural basin into the lands of the plaintiff, and from thence in a pure and unpolluted state to the plaintiff's mill. In 1857 the defendant went into the possession of lands on the summit of the hills at a higher elevation than the cavern, and commenced the work

of excavating lead from the soil of the hills. In the prosecution of this work he erected eight puddles, or circular pits, in the surface of the ground, into which water was brought by artificial cuts. From these puddles the water polluted by the process of the manufacture was discharged through two swallets or rents in the limestone rock, which had existed immemorially, and having an underground passage for the water communicating with an outlet, from which the water escaped into an open stream at their foot. The water passages from these two swallets communicated with the water passage of the cavern, and thus the polluted water was carried to the plaintiff's mills and produced serious damage to the plaintiffs. This was held to be an actionable nuisance.

In *Lingwood v. Stowmarket Co.*, 1 L. R. Eq. Cas. 77, the plaintiffs were the proprietors of an upper, and the defendants of a lower, mill on a stream. The defendants discharged the refuse from their mill into the stream, polluting the water so that, when it reached the plaintiff's mill, it was greatly impaired in value for their use. Held a nuisance, and enjoined.

In *Crossley v. Lightowler*, 3 L. R. Eq. Cas. 279; 2 L. R. Ch. App. 478, the plaintiffs were carpet manufacturers on the river Hebble, and the defendants were proprietors of dye-works on the stream above. By discharging the refuse from their works into the stream they so polluted it as greatly to impair its value for use by the plaintiffs. Held a nuisance and restrained.

In *Thomas v. Brackney*, 17 Barb. (N. Y.) 655, the plaintiff owned a grist-mill, and the defendant a tannery upon the same stream. The defendant's tannery was up the stream, and he discharged the tanbark from his tan-works into the stream, which was swept down the stream into the plaintiff's mill-pond, filling his race, and clogging the wheel used to run the mill. Held an actionable nuisance.

In *O'Riley v. McChesney*, 3 Lans. (N. Y.) 278, the plaintiff and defendant were owners of mills upon the same stream. The defendant had a flax-mill, and allowed flax shives to escape into the stream and float down into the plaintiff's mill-pond, where they got into his race-way and interfered with

the operations of his wheel. Held a nuisance.

In *Hounsee v. Hammond*, 39 Barb. (N. Y.) 89, it appeared that the plaintiff was the owner and in possession of a valuable farm of land in the town of Neversink, upon which were dwelling-houses, barns and outbuildings used for agricultural purposes. There were also on this farm a mill-pond, a valuable saw-mill, turning-mill, and machinery supplied with water through a race-way from the river which ran through the plaintiff's farm and on which was a brush dam, by means of which the water was turned into the mill race and taken to the pond. Higher up upon the same stream (about a quarter of a mile), the defendants erected and operated a tannery for manufacturing leather. From this tannery they threw into the stream their tan-bark, together with portions of the hair, skimmings, filth and refuse matter from their hides which floated directly down the stream into the mill-pond, saw-mill and machinery of the plaintiff, greatly impairing the working and usefulness of the plaintiff's mills, until it greatly injured their value. Verdict for plaintiff for \$100.

MILLER, J., said: "The defendants were clearly liable for the injury although the damage may have been done by them without any intent to injure. They had no right as riparian owners to use their privilege in any way to the detriment of a proprietor below them. Although they had a right to use the water for all legitimate and proper purposes, they were not authorized to use the stream to the injury of those below, or in any way to interfere with his privileges. The judge below very properly refused to charge that no action could be maintained for throwing the tan-bark into the river when it was done with no intent to injure and in the usual manner in which the water was used in tanneries. One riparian proprietor has no right to use the water so as to clog it with noxious or foreign matter to the injury of those below."

In *Snow v. Parsons*, 28 Vt. 459, it was held that a general custom of discharging refuse from a saw-mill into the stream was a protection against an action by one injured thereby. But in *Jacobs v. Allard*, 42 Vt. 303, while it was held that the proprietor of a saw

CHAPTER TWENTIETH.

PRESCRIPTION FOR NUISANCES.

- SEC. 701. Prescriptive rights, ancient and modern rule.
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mill is not liable for waste therefrom discharged into the stream in the ordinary course of the business of running such mills, yet it was held that he would be liable if such waste was discharged into the stream in a wanton or needless manner. This doctrine hardly commends itself to favorable adoption, and indicates that the composition of the court has undergone a marked change since the cases of *Chatfield v. Wilson* and *Harwood v. Benton* were decided. Then it was thought that the *motives* with which a lawful act was done, did not affect the question of liability. *Montgomery v. Flem-*

ing, 25 Jur. 499; *Dunn v. Hamilton*, 2 S. & McL. (Sc.) 356; *Miller v. Marshall*, 5 Mur. (Sc.) 28; *Russell v. Haig*, 3 Pat. App. (Sc.) 403; *Watson v. Toronto Gas-light Co.*, 4 U. C. 158; *Lillywhite v. Trimmer*, 16 L. T. (N. S.) 190; *Hayes v. Waldron*, 44 N. H. 585; *Chadwick v. Marsden*, 2 L. R. (Ex.) 285; *Phoenix Water Co. v. Fletcher*, 23 Cal. 481; *Jones v. Crow*, 32 Penn. St. 398; *Duke of Buccleugh v. Coman*, 5 Macph. (Sc.) 214; *Lord Blantyne v. Navigation Co.*, 5 id. 508; *Robertson v. Stewart*, 9 C. & M. (C. S.) 189; *Rigby v. Downie*, 10 B. & S. (C. S.) 568; *Turner v. Mirfield*, 34 Beavan, 390.

SEC. 726. *Rhodes v. Whitehead.*

727. No prescriptive right acquired when nuisance in the vicinity of vacant lands.

728. Prescriptive right once acquired cannot be lost, except by non-user etc.

SEC. 701. Much seeming confusion exists in the books upon the question as to whether a prescriptive right can be acquired to maintain all species of private nuisances; particularly such as corrupt the atmosphere with smoke, noxious vapors or noisome smells, or produce results injurious to health.

It becomes important, therefore, to understand what constitutes a prescriptive right, and how it is acquired. It is not necessary to give a minute detail of the distinction between the old and the modern doctrine of prescription, it is sufficient to say that the ancient rule, that the user must be for a period "beyond which the memory of man runneth not to the contrary," or in other words, for so long a period that the time when the user commenced could not be shown, has been discarded; and, under the modern doctrine, it is sufficient to establish a user of twenty years, or rather for such a period of time as is fixed by statute in the several States of this country, for the acquisition of titles to real estate by adverse enjoyment.¹ Anciently, the doctrine rested upon the presumption of a conveyance by a lost deed; but now, a user for the statutory period raises the presumption of a grant, even though the use in its inception was an actual trespass.²

SEC. 702. The presumption raised in support of a grant, by such user, is not conclusive, but may be rebutted and entirely overcome by proof of an interruption of the user, even though the interruption be slight, and only of a temporary character.³ The question as to whether the user was adverse and in derogation of another's title, and has been open and continuous, or whether it has been in subordination to another's title, or secret, or inter-

¹ *Coe v. Walcottville Manufacturing Co.*, 3 Conn. 175; *Carlisle v. Cooper*, 4 Green (N. J.), 256; *Tracy v. Atherton*, 36 Vt. 503; *Townsend v. Downer*, 32 id. 183; *Shumway v. Simons*, 1 id. 53.

² Washburn on Easements, 111;

Sibley v. Ellis, 11 Gray (Mass.), 417; *Heirs of Marr v. Gilliam*, 1 Cold. (Tenn.) 488.

³ *Stilman v. White Rock Co.*, 3 W & Min. (U. S. C. C.) 549.

rupted, is always for the jury to determine from the circumstances and proof in each case.¹

SEC. 703. A title by prescription cannot be acquired by a secret user. The use must be open,² and as of right,³ and must be continuous,⁴ and with the knowledge of the person owning the fee.⁵

By continuous user is not meant a constant use, but such a use as *is consistent with the nature of the right claimed*, and as operates an actual invasion of another's right.⁶ Thus, where a person sets up a prescriptive right of way over another's land, by adverse user, it is not necessary that he should show that he has actually used the way each year, by direct evidence; but the right will be sustained if he establishes the fact that he has used the way openly, at intervals during that entire period, as his interest and necessity required.

From these facts, the jury will be warranted in presuming that the user has been consistent with the nature of the right claimed.⁷ Thus, a person owning a wood lot, from which he draws wood each winter across the land of another, by the exercise of this right for the period of twenty years uninterruptedly, acquires the right to cross that land *for that purpose*, even though he should not draw wood there every year of the entire period; but the right must be exercised so continuously, and in such a manner as, under all the circumstances of the case, to warrant a presumption of title; and the right thus acquired will be restricted to the user. By using the way for the drawing of wood in the winter, he would not thereby acquire the right to use it for a similar purpose in the summer months, nor would he acquire the right to use it for any other purpose than that to which it had been devoted.⁸

¹ Fish Co. v. Dudley, 37 Conn. 136.

² Solomon v. Vinters Co., 4 H. & N. 409.

³ Eaton v. Swansea Works, 17 Q. B. 267; Winship v. Hudspeth, 10 Exchq. 5; Greatrex v. Hayward, 8 id. 290.

⁴ Rhodes v. Whitehead, 27 Tex. 304; Stein v. Burden, 24 Ala. 130; Evans v. Dana, 7 R. I. 306; Holsman v. Boiling Springs Co., 1 McCarter (N. J.), 335.

⁵ Daniel v. North, 11 East, 372; Nichols v. Aylor, 7 Leigh (Va.), 546; Smith v. Miller, 11 Gray (Mass.), 148;

Wood v. Veal, 5 B. & Ald. 454; Yard v. Ford, 2 Wm. Saund. 175.

⁶ Horner v. Stilwell, 35 N. J. 307.

⁷ Bodfish v. Bodfish, 105 Mass. 317; Allan v. Gourme, 11 Ad. & El. 759; Richardson v. Pond, 15 Gray (Mass.), 389; Ballard v. Dyson, 1 Taunt. 279; Horner v. Stilwell, 35 N. J. 307.

⁸ Brooks v. Curtis, 4 Lans. (N. Y. S. C.) 283; Wright v. Moore, 38 Ala. 593; Rexford v. Marquis, 7 Lans. (N. Y. S. C.) 257. In Atwater v. Bodfish, 11 Gray (Mass.), 152, it was held that a right

SEC. 704. The right acquired is not to be measured by the party's *claim*, but by his actual user. Thus, a person who erects a dam of a given height, which, if maintained in a tight condition, would set the water back upon another's land, cannot, by maintaining the dam for the statutory period in such a condition as not to flood the lands above him, acquire a right to flood the lands by repairing his dam, after the statutory period has elapsed, but his right will be measured by, and limited to the extent to which the lands were usually flowed during the period of prescription.¹

SEC. 705. There is a distinction between a prescriptive right to do some act upon one's own premises that operates injuriously to another, and a right to do some act *upon* another's premises.² In the latter case, each act of user, before the user ripens into a right, is a trespass, for which an action may be maintained at any time, while in the former no action can be maintained until some *right* has been invaded. In the one case there is an actual invasion of the property itself, while in the other there is a mere invasion of some right.³ Therefore it will be seen, that while in the one case proof of the adverse user for the requisite period may be comparatively easy, in the other it is always attended with great difficulty, and in some instances might be actually incapable of proof.

The rule is, and it is important to be remembered, in view of

of way, acquired for the drawing of wood from a lot, ceased to exist when the wood was all cut off. In *McCallum v. Germantown Co.*, 54 Penn. St. 40, it was held that where a waterway had been acquired to bring goods to a tavern, it did not exist for any other purpose than the occupancy of the tavern. *Simpson v. Coe*, 4 N. H. 301; *McNab v. Adamson*, 6 U. C. Rep. 100.

¹ *Horner v. Stilwell*, 35 N. J. 307; *Rexford v. Marquis*, 7 Lans. (N. Y. S. C.) 251; *Noyes v. Morrill*, 108 Mass. 396.

In *Stiles v. Hooker*, 7 Cow. (N. Y.) 266, it was held that when a person has had the use of water at a given height for twenty years, a grant will be presumed for using it at that height, but that this will not justify him in repairing his dam so as to raise the water higher, and flood the lands above him which have not previously been

flooded. See, also, *Russell v. Scott*, 9 Cow. (N. Y.) 279; *Dyer v. Depui*, 5 Whart. (Penn.) 584.

The justice of this rule is obvious. To allow a person to build a dam of a given height, and maintain it for twenty years in a leaky condition, so that it would produce no injury to those above him on the stream, and then permit him, under cover of a prescriptive right, to repair his dam and set the water back upon riparian owners above him on the stream, would open the door to the most flagrant frauds and the most oppressive wrongs.

² *LITTLEDALE, J.*, in *Moore v. Rawson*, 3 B. & C. 332; 19 E. C. L. 332; *Atkins v. Chilson*, 7 Met. (Mass.) 398.

³ *Holsman v. Boiling Spring Co.*, 1 McCarter (N. J.), 335; *Embrey v. Owen*, 4 Eng. Law & Eq. 340; *Durel v. Boisblanc*, 1 La. An. 407.

the doctrines that will be announced hereafter, that to constitute an adverse user requisite to sustain the right, it must be shown that the user has actually invaded the rights of the person against whom the claim is made, in reference to the particular matter which is the subject of complaint, and that the user, during the entire statutory period, and the invasion of the right, have produced an injury equal to, and of the character complained of, and of such a character and to such an extent that at any time during that period an action might have been maintained therefor.¹

SEC. 706. The rule in reference to this class of injuries laid down in *Crosby v. Bessey*, referred to in the preceding note, that the injury complained of, in order to be barred by a prescriptive right, must have been continued in substantially the *same* way and with equally injurious results for the entire statutory period, and that the right does not begin to run until an actual actionable injury is inflicted, is the true one, and the rule that must necessarily be applied to prescriptive rights to perpetrate consequential injuries upon others.²

Less difficulty will be experienced in determining these questions where actual, sensible or visible injuries result from a nuisance, than in that class of cases where the injury is to the com-

¹ In *Webb v. Bird*, 13 C. B. (N. S.), the court say that the presumption of a grant from long user only applies when the person against whom the right is claimed might have interrupted or prevented its exercise. *Staffordshire Navigation Co. v. Birmingham Navigation Co.*, L. R. 1 H. L. 254; *Flight v. Thomas*, 10 Ad. & El.

In *Crosby v. Bessey*, 49 Me. 539, it was held that where a tanner has thrown the bark from his mill into a stream for more than twenty years, he acquires no prescriptive right to the injury of those below on whose land it is deposited by the natural action of the water, unless it appears that the deposit has been made on the *same* land, *with the same injury*, during the whole term of the twenty years, and that the right does not begin to run until actual damage is inflicted. *Norton v. Valentine*, 14 Vt. 230; *Webster v. Flemming*, 2 Humph. (Tenn.) 518; *Plumleigh v. Dawson*, 1 Gil. (Ill.) 544.

In *Postlethwaite v. Paine*, 8 Ind. 104, it was held that in order to establish a right by prescription, it must, as a general rule, be shown to have been enjoyed in the *same* degree and to the *same* extent as claimed.

In *Stein v. Burden*, 24 Ala. 130, it was held that in order to acquire a prescriptive right to divert water from a running stream, it is not necessary that the water should be used in *precisely* the same manner, or applied in the same way, but that no change in the method of use can be made that operates more injuriously to those whose interests are involved. The rule as given in *Postlethwaite v. Paine*, *supra*, is the true rule, as applicable to water, or any interference with the elements. It will readily be understood that the right cannot exceed the user, and that, as it is the user long continued that confers the right, it must necessarily be the measure of and limit the right.

² *Crosby v. Bessey*, 49 Me. 439.

fortable enjoyment of premises by invisible agencies, such as noxious smells, deleterious gases, smoke and noxious vapors; therefore, in the discussion of the question hereafter, we shall confine ourselves mainly to that class of injuries.

SEC. 707. There exists in the decisions of the courts of this country, a seeming confusion upon the question as to whether a prescriptive right can be acquired to maintain a nuisance that corrupts the atmosphere with noxious smells, deleterious gases, smoke or noxious vapors, particularly where they are injurious to health,¹ and in some instances where they are injurious to property,² but this *seeming* confusion arises from the loose dicta of courts rather than from the actual decision of the cases.

SEC. 708. In *Campbell v. Seamen*, 2 N. Y. Sup. Ct. Rep. (Pars. ed.) 240, POTTER, J., in discussing the question as to whether a prescriptive right can be acquired to maintain a nuisance, says: "It is also urged that the doctrine of prescription applies to the defendant's right to use his premises as a brick-yard. There are some *dicta* in the reported cases in England as well as in the elementary books suggesting that an individual may acquire a right to maintain an offensive trade by prescription, by an undisturbed use of such a business for over twenty years. In the case of *Tipping v. St. Helen Smelting Co.*, 4 B. & S. 608, this intimation was given to the jury by the judge as follows: 'Every man is bound to use his own property in such a manner as not to injure the property of his neighbor, unless by lapse of time he has acquired a prescriptive right to do so.' But he did not intimate that the right by prescription applied to a case of nuisance which visibly diminished the value of the neighbor's property and destroyed the comfort and enjoyment of it, but clearly intimated the contrary (p. 611). In a *nisi prius* ruling in *Rex v. Cross*, 2 Car. & P. 483, it was said, 'If a certain noxious trade is already established in a place remote from habitations * * * and persons come and build houses within the reach of its noxious effects, in those cases the party would be entitled to

¹ *Mills v. Hall*, 9 Wend. (N. Y.) 316. ¹ *Peck v. Elder*, 3 Sandf. (N. Y.) 126;

² *Dana v. Valentine*, 5 Met. (Mass.) *Fay v. Whitman*, 100 Mass 547.

continue his trade, because his trade was *legal* before the erection of the house,'” etc.

“This last remark of the judge was entirely *obiter*, and, was it not so, it is in conflict with other English authority. The English cases with their conflicts have been ably reviewed in our own courts. Whatever may be the rule in England or Pennsylvania on the subject of gaining a right to continue nuisances by prescription, and of the consideration of pecuniary profit to him who continues it, or benefit to trade and commerce, no such rule prevails in this State. “Such a doctrine,” says DANIELS, J., in *Taylor v. People*, 6 Park. Cr. Rep. 353, “would render the property of others subordinate to the purposes of him who might, before they had erected their dwellings, have devoted his own to an offensive and unwholesome business. There is no sound principle of law that will protect any man in thus depriving others of the substantial use and enjoyment of their property.” That was an indictment for nuisance in maintaining a slaughter-house, and it was held to be no defense that the slaughter-house, when built, was remote from habitations, and that the persons suffering from the stench afterward built their dwellings within the reach of its noxious effects. So it was said by JEWETT, J., in *People v. Cunningham*, 1 Denio, 536, “No lapse of time will enable a party to prescribe for a nuisance.” See *Mills v. Hall*, 9 Wend. 316, and cases cited.

This same rule prevails in Massachusetts. In *Commonwealth v. Upton*, 6 Gray, 473, it was held, that carrying on an offensive trade for twenty years in a place remote from buildings and public roads, does not entitle the owner to continue it in the same place after houses have been built and roads laid out in the neighborhood, to the occupants of and travelers upon which it is a nuisance.”

The doctrine of this case bearing upon the question of prescription is clearly wrong in principle, and not sustained by the authorities referred to in its support, or by *any* authorities to be found in the books. The learned judge who delivered the opinion was doubtless misled by the authorities referred to, and failed to make that distinction between injuries resulting from a public, and those arising from a purely *private* nuisance,

which he would doubtless have made, had his attention been called to the cases bearing upon that point.

The statement of the court, that MELLOR, J., in *Tipping v. St. Helen Smelting Co.*, intimated that a prescriptive right could not be acquired for the exercise of a noxious trade, is hardly sustained by the language of that learned judge in his charge to the jury, which follows the portion of the charge quoted by POTTER, J., *ante*. He adds: "But *here* you have no prescriptive right at all, you are to consider this as if done recently, and you are, therefore, not embarrassed by any consideration of that sort." It can hardly be claimed that this language — which is all that was said upon that point — contains any sort of intimation that, if the defendant had carried on his trade in that locality for twenty years, he might not have acquired a prescriptive right to continue it there. But, on the contrary, it is very evident that Justice MELLOR understood that such a right *might* be acquired, but, owing to the fact that as in that case the nuisance complained of had only been in existence *two years*, no such right existed, or could be set up.

The *dicta* in *Rex v. Cross*, referred to by the court, had no reference whatever to a *prescriptive* right, but was an advancement of that *monstrous, untenable* and *senseless* doctrine, that a person by being first in point of time in the occupancy of his premises, for however short a period, might acquire a right to do any act legitimately incident to his business, and that other owners coming later to the locality could not complain of its ill effects.

The remarks of DANIELS, J., in *Taylor v. The People*, had no reference to the doctrine of prescription. In fact, the nuisance in that case had only been established eleven months, when the indictment was brought and the case tried. What the judge in *that* case referred to, was the point made by the defense, that the defendant having erected his slaughter-house when no dwellings were near, those coming to dwell within its sphere were estopped from complaining of its ill results.

In the case of *The People v. Cunningham*, the remarks of JEWETT, J., that "no lapse of time will enable a person to prescribe for a nuisance" were intended to apply exclusively to a *public* nui-

sance, as is evident from the cases referred to by him, and is also evident from the fact that so eminent a jurist would hardly have made so grave an error as to have announced such an unfounded and erroneous legal proposition, as this would be, if it was given any different application.

The case of *Com. v. Upton*, referred to, was a case where the respondent was indicted for maintaining a public nuisance, in the shape of a slaughter-house. The court in that case said that there "can be no prescription for a *public* nuisance;" but that there *can* be a prescription for a *private* nuisance, even when the nuisance results from a noxious trade, emitting offensive smells, has long been held in Massachusetts, and is now recognized as the law of that State.

In *Dana v. Valentine*, 5 Met. (Mass.) 8, the defendant erected a slaughter-house in the suburbs of Cambridge, and maintained it there for the purpose of slaughtering cattle, boiling soap and manufacturing candles, from the year 1825 down to the time when the plaintiffs brought their bill for an injunction, with a *cessor* of only two years. The plaintiffs being the owners of vacant lots, and some of them of dwelling-houses within the sphere of its effects, brought a bill to restrain the defendant from carrying on his business there. The defendant set up a user of his premises for that purpose for twenty-four years, and claimed that he had acquired a right, as against the plaintiffs, to carry on his trade in that place. The court denied the injunction, upon the ground that it appeared that the defendant might have acquired a prescriptive right to exercise his trade there. The court say: "The defense is, that the defendant, and those under whom he claims his title, have been in the possession of the buildings in which he carries on his trade for more than twenty years, during which time, he and they carried on his trade without molestation or interruption, except for about two years, during which the buildings were not so used by them. This, *prima facie*, is a good foundation for the presumption of a grant, unless the said *non-user* is to be considered as breaking the continuity of the possession. The facts and circumstances in evidence are not sufficient to enable the court to give any decisive opinion on this point; but such as the evidence is, it is not sufficient to show any relinquishment or

abandonment. * * * Another objection to the defendant's title by prescription is, that until *lately* the plaintiffs suffered no damage from the alleged nuisance, and therefore could not interfere to prevent its continuance. But it is very clear that when a party's right of property is invaded, he may maintain an action for an invasion of his right without proof of actual damages."¹

SEC. 709. *Theoretically* the doctrine as announced in *Campbell v. Seamen*, *ante*, is incorrect and not sustained either in principle or by authority; but *practically* it is so or very nearly so. This may seem a strange assertion at first thought, but it is nevertheless true, and very few cases are to be found where, when a prescriptive right has been asserted, to send a polluted atmosphere over another's premises, the right has been sustained.² Not, however, because the right cannot be acquired, because the cases fully recognize the right in numerous instances;³ but because the

¹ *Grant v. Lyon*, 4 Met. (Mass.) 477; *Atkins v. Boardman*, 2 id. 469; *Bolivar M'fg Co. v. Neponset M'fg Co.*, 16 Pick. (Mass.) 247.

² In *Charity v. Riddle*, 14 F. C. (Sc.) 340, the defendants had erected and carried on for more than twenty years in the suburbs of Glasgow, an establishment for the manufacture of glue, which emitted nauseous and offensive stenches. It also appeared that there were other establishments of a noxious character in the neighborhood. The defendant being about to enlarge his works, the plaintiff brought his petition for an interdict. The court held that by an unmolested uninterrupted exercise of his trade in that locality for twenty years the defendant had acquired a prescriptive right as against the plaintiff to continue it, but that he could not increase the nuisance by increasing the capacity of his works, and prohibited him from enlarging them.

In *Duncan v. Earl of Moray*, 15 F. C. (Sc.) 302, the defendant and others had for more than forty years been accustomed to collect the *faeces* from the sewage of Edinboro' that was discharged into the sea and found its way into the Foul Burn, in pits, and the matter thus collected there was used for manure, and emitted noxious stenches that were very offensive. The plaintiff, who resided and owned property on the banks of

the Foul Burn in the vicinity of the defendant's pits, brought his action against him therefor. The court held that, it appearing that these pits had existed for forty years, and that the offensive smells therefrom were no more offensive than formerly, the defendant had acquired a prescriptive right to maintain them there. *Colville v. Middleton*, 19 F. C. (Sc.) 339; *Miller v. Marshall*, 5 Mur. (Sc.) 32.

³ *Tipping v. St. Helen Smelting Co.*, 11 H. L. Cas. 643. In *Bliss v. Hall*, 6 Scott, 500, PARK, J., said: "Twenty years user would legalize the nuisance," which was for offensive stenches arising from a candle factory.

In *Ric de D. Assize Book*, 4, pl. 3, p. 6, cited in *Gale on Easements*, p. 187, the court recognized a prescriptive right to maintain a lime kiln.

In *Elliottson v. Feetham*, 2 Bing. (N. C.) 134; S. C., 2 Scott, 174, the defendant set up a prior use of ten years, but the court held that only a user of twenty years would legalize a *noisy* nuisance.

In *Roberts v. Clarke*, 18 L. T. (N. S.) 48, which was an action for burning brick near the plaintiff's dwelling, and sending smoke and offensive stenches over the plaintiff's premises, the court recognized the right by prescription to exercise such a trade, although not held sufficient in this case. *Dana v. Valentine*, 5 Metc. (Mass.) 8; *Flight v. Thomas*, 10 Ad. & El. 590.

burden of establishing the right by user is upon him who asserts it, and applying the rules applicable to the acquisition of such rights, there are very few cases in which it can be clearly established.¹

SEC. 710. The fact that a noxious trade has been exercised for twenty years in a particular locality does not by any means establish a prescriptive right to exercise it there. It is, however, evidence, from which, in connection with other proof, the right may be established. But, in order to establish the right as against any party complaining, the burden is imposed upon the defendant who sets up the right as a defense, of proving that for the period of twenty years he has sent over the premises in question from his works an atmosphere equally as polluted and offensive as that complained of.² Proof that he has polluted the air is not enough; he must show that for the requisite period he has sent over the land an atmosphere so impure and polluted as to operate as an actual invasion of the rights of those owning the premises affected thereby, and in such a manner that the owner of the premises might have maintained an action therefor. Less than that is insufficient.³ He must also show that his user at the time when the action is brought is not substantially in *excess* of that which he has exercised during the period requisite to acquire the right.⁴ The right is restricted to and measured by the use.⁵ For all *excess* of user, an action lies. The enjoyment of a limited right cannot lawfully be enlarged, and any excess of use over that covered by the actual user under which the right was gained,

¹ *Bradley's Fish Co. v. Dudley*, 37 Conn. 136.

² *Flight v. Thomas*, 10 Ad. & El. 590.

³ *Roberts v. Clarke*, 18 L. T. (N. S.) 48; *Luther v. Winnissimmet Co.*, 9 Cush. (Mass.) 171.

⁴ *Weld v. Hornby*, 7 East, 195; *Topling v. Jones*, 11 H. L. Cas. 265; *Goldsmith v. Tunbridge Wells, etc., Improvement Co.*, 1 L. R. Eq. Cas. 352; *Baxendale v. Murray*, 2 L. R. Ch. App. 790; *Ball v. Ray*, 8 id. 467; *Crossley & Sons v. Lightowler*, 3 L. R. Eq. Cas. 279; *Stein v. Burden*, 24 Ala. 130.

⁵ *Ballard v. Dyson*, 1 Taunt. 277; *Jackson v. Stacey*, 1 Halt. 455; *Cowling v. Higginson*, 4 M. & W. 245; *Pearson v. Underhill*, 16 Q. B. 123; *Davies*

v. Williams, id. 547; *Bower v. Hill*, 2 Bing. (N. C.) 339; *De Rutzen v. Lloyd*, 5 Ad. & El. 456; *Allan v. Somme*, 11 id. 759; *Higham v. Rabett*, 5 Bing. (N. C.) 622; *Henning v. Barnett*, 8 Exchq. 187; *Brooks v. Curtis*, 4 Lans. (N. Y. S. C.) 283; *Wright v. Moore*, 39 Ala. 593; *Atwater v. Bodfish*, 11 Gray (Mass.), 152; *Rexford v. Marquis*, 7 Lans. (N. Y. S. C.) 257; *Simpson v. Coe*, 4 N. H. 301; *Horner v. Stilwell*, 35 N. J. 307; *Noyes v. Morrill*, 108 Mass. 396; *Stiles v. Hooker*, 7 Cow. (N. Y.) 266; *Burrell v. Scott*, 9 id. 279; *Dyer v. Dupey*, 5 Whart. (Penn.) 584; *Rogers v. Allen*, 1 Camp. 313; *Martin v. Gable*, id. 320; *Bealey v. Shaw*, 6 East, 208.

will be actionable.¹ The rule is, that "a prescription is *entire* and cannot be *split*" by either the party setting it up, or the party opposing it. In *Rogers v. Allen*, 1 Camp. 308, the plaintiff brought an action of trespass against the defendant for breaking and entering a several fishery. The plaintiff alleged in his declaration a prescriptive right of fishing over *four* places in a navigable river. Upon trial, he failed to prove a right in but *three*, and the court held that when an action is brought to recover for an injury to a prescriptive right, the prescription must be proved as laid, and that if the right is only shown to exist in three of the places named in the declaration, the variance is fatal, and no recovery can be had even though it is also shown that the trespasses were committed in one of the *three* places over which the right existed. The party does not fail because he shows the right to be more ample than he has laid it,² but he must prove it to exist to the full extent claimed.³ The effect of this rule is this, where a person sets up a prescriptive right to do an act with which he is charged in an action on the case, as for the pollution of the atmosphere over the plaintiff's premises, by carrying on a particular trade, he is bound to set up a right to do all that he is charged with doing, in the declaration, that forms the basis of an action for damages. He cannot defend by setting up a prescriptive right to do less, and if he sets up a prescriptive right to do all that he is charged with doing, his plea fails, if he fails to show a right as extensive as the one exercised by, and charged against him in the declaration. Therefore he does not sustain his plea by proof of a right to *pollute* the air, unless he also shows *that he had a right to pollute it to the extent and with the results* charged and proved against him. This was held as early as the case of *Rotheram v. Green*, Noy, 67, and has not been materially varied since. The soundness of the doctrine is apparent and is well sustained by authority.⁴

¹ *Chandler v. Thompson*, 3 Camp. 80; *Weld v. Hornley*, 7 East, 195; *Tapling v. Jones*, 11 H. L. Cas. 290; *Staight v. Burn*, 5 L. R. (Ch. App.) 163.

² *Johnson v. Thoroughgood*, Hob. 64; *Bushwood v. Bond*, Cro. Eliz. 722.

³ *Rotheram v. Green*, Noy, 67; *Com-gers v. Jackson*, Clay. 19; *Corbett's*

Case, 7 Coke, 5; *Hickman v. Thorny*, Free. 211; *Kingsmill v. Bull*, 9 East. 185; *Moorewood v. Jones*, 4 T. R. 157.

⁴ *Tapling v. Jones*, 11 H. L. Cas. 290; *Weld v. Hornby*, 7 East, 195; *Bailey v. Appleyard*, 3 Nev. & P. 172; *Wilcome v. Upton*, 6 M. & W. 536.

SEC. 711. It is, as has before been stated, not enough to show that a noxious trade has been exercised in a particular locality for twenty years, and a plea setting up a prescriptive right in that way would be bad, and a verdict for the defendant upon such a plea would be set aside. In *Flight v. Thomas*, 10 Ad. & El. 590, the plaintiff brought an action against the defendant for sending offensive smells over his premises. The defendant replied by setting up that for more than twenty years prior to the bringing of the plaintiff's action he by himself and his predecessors had enjoyed and exercised the right without molestation, of using a certain mixen in and upon his premises, and that the smells and stench complained of in the plaintiff's declaration arose from said mixen, necessarily and unavoidably, but the plea did not allege that the smells had gone over the plaintiff's land for twenty years. The jury found that the mixen was a nuisance but that the plaintiff had used it for more than twenty years, and a verdict was thereupon entered for the defendant. Upon a rule to show cause why judgment should not be rendered for the plaintiff *non obstante veredicto*, Lord DENMAN, C. J., said: "There is no claim of an easement, unless you make it appear that the offensive smell *has been used for twenty years to go over to the plaintiff's land*. The plea may be completely proved without proving that the nuisance ever has passed beyond the limits of the defendant's own land."

LITTLEDALE, J., said: "The plea only shows that the defendant has enjoyed, as of right, and without interruption for twenty years, the benefit of something that occasioned a smell in his own land." The judgment was reversed and judgment rendered for the plaintiff *non obstante veredicto*.

SEC. 712. The right being only to the extent of the use, and it being incumbent upon the defendant to establish the right by proving a use as extensive as that complained of,¹ and in addition thereto, to prove that for the requisite period, the noxious smells have passed over the plaintiff's premises, to such an extent as to be a nuisance, and actionable as such,² and the presumption being

¹ *Ballard v. Dyson*, 1 Taunt. 179; 389; *Atwater v. Bodfish*, 11 Gray Richardson v. Pond, 15 Gray (Mass.), (Mass.), 152.

² *Flight v. Thomas*, 10 Ad. & El. 590.

that he who does an act upon his own premises confines all its ill effects there, then the difficulty of establishing a prescriptive right in such a case is obvious.¹ The presumption is that all acts done upon one's own premises are lawful, therefore, if the party doing the acts seeks to avail himself of them to establish a right, the burden is upon him to show that during the whole period of user they have been unlawful.²

SEC. 713. In order to establish a right by prescription, the acts by which it is sought to establish it must operate as an invasion of the particular right that it is sought to quiet to such an extent as to be actionable during the whole period of use, so that

¹ *Flight v. Thomas*, ante.

² *Monke v. Butter*, 1 Rolle's Rep. 83; *Williams v. The East India Co.*, 3 East, 199; *Lord Halifax's Case*, Buller's N. P. 298; *Powell v. Millbank*, 2 Bl. 851; *Rex v. Combs*, Comb. 57; *Viner's Abr. tit. Evidence*.

In *Branch v. Doane*, 17 Conn. 402, it was held that the time while the dam was being constructed, and the time that intervened between its construction and the permanent setting back of the water, is not included in the duration of the use, and that the right does not begin to run until an actual invasion of the party's right is created. *Casper v. Smith*, 9 S. & R. (Penn.) 33; *Cooper v. Barber*, 3 Taunt. 99.

In *Murgatroyd v. Robinson*, 7 Ellis & B. 391, the defendant had for a long time been accustomed to throw cinders from his works into the stream which fed the plaintiff's mill. He had exercised this right for more than thirty years, but no injury resulted to the plaintiff's works therefrom until the time named in the declaration. The court held that the prescriptive right would be claimed as dating beyond the time when actual injury resulted from the use.

In *Polly v. McCall*, 37 Ala. 30, the defendant dug a ditch in his own land and diverted the waters of a stream flowing through his land and the plaintiff's into the ditch. The ditch was thus maintained for several years, and no injury resulted to the plaintiff therefrom. But the ditch having been allowed to become foul and clogged, the plaintiff's premises were injured. In an action for the injury, the defend-

ant set up a prescriptive right to maintain the ditch and divert the water there, but the court held in that case that the prescription could not date beyond the time when injury first resulted to the plaintiff from the diversion. *Roundtree v. Bountly*, 34 Ala. 544; *Crosby v. Bessey*, 49 Me. 539.

In *Parker v. Foot*, 19 Wend. (N.Y.) 309, it was held, that it was enough if a right was invaded, so that an action could be maintained therefor, even though no actual damage existed. *Hobson v. Todd*, 4 T. R. 71; *Bliss v. Rice*, 17 Pick. (Mass.) 23; *Atkins v. Boardman*, 2 Met. (Mass.) 457; *Hapwood v. Schoefeld*, 2 M. & Rob. 34; *Shadwell v. Hutchinson*, 4 C. & P. 333.

In *Young v. Spencer*, 10 B. & C. 143, the plaintiff brought an action against the defendant, who was his tenant, for opening a new door, alleging as a ground of recovery that by the cutting of the door the house was weakened and injured. The jury found that the defendant cut the door, but also found that the house was not weakened thereby. A verdict having been directed for the defendant upon a rule to show cause, the court ordered a new trial on the ground that, although the house might not be weakened, some right of the reversioner might thereby have been injured.

In *Patrick v. Greenway* m. cited 3 Wm. Saunders, 175, n., the plaintiff brought an action against the defendant for fishing in his fishery. The defendant caught no fish, but the court sustained the action upon the ground of its being an invasion of the plaintiff's right.

the party whose estate is sought to be charged with the servitude could have maintained an action therefor. The rule is, that a prescription can only operate against one who is capable of making a grant. Therefore, if the estate was in the possession of a tenant for life,¹ or for a term,² or if the owner of the fee was a minor,³ a married woman,⁴ or an insane person,⁵ no right can be acquired during the term, or while the disability exists. In order to acquire the right, the person owning the estate affected thereby must be in a condition to resist it. But where the adverse use has begun before the owner of the servient estate lets it, the letting of the estate does not prevent the acquisition of the right. He having been in a position to resist the adverse use, cannot, by voluntarily putting himself in a position where he cannot resist it, prevent the perfection of the right while the estate is in the possession of the tenant.⁶ Neither does the fact that the premises are in the possession of a tenant permit the perfection of the right, if the injury is of such a character, and is known to the landlord, that he could maintain an action for an injury to the reversion.⁷

It is only as against such rights as operate an injury to the reversion, so that an action can be maintained by the reversioner therefor, that a prescriptive right can be acquired while the premises are in the possession of a tenant, and *then*, in order to acquire the right, the user must be *open* and of such a character that the reversioner may fairly be presumed to have knowledge of it, or actual knowledge must be shown. Indeed, the user must be such that it can fairly be said to be with the *acquiescence* of the reversioner, and an acquiescence by the tenant does not bind him.⁸

¹ *McGregor v. Waite*, 10 Gray (Mass.), 75; *Barker v. Richardson*, 4 B. & Ald. 579; *Wood v. Veal*, 5 B. & S. 454; *Harper v. Charlesworth*, 4 B. & C. 574.

² *Wood v. Veal*, ante. In *Bright v. Walker*, 1 C. M. & R. 211, it was held that the user must be such as to give a right against all persons having estates in the lands affected thereby. See *Winship v. Hudspeth*, 10 Exchq. 8, ALDERSON, B.

³ *Watkins v. Peck*, 13 N. H. 360; *Mebane v. Patrick*, 1 Jones (N. C.), 26.

⁴ *McGregor v. Waite*, ante.

⁵ *Edson v. Munsell*, 10 Allen (Mass.), 557.

⁶ *Mebane v. Patrick*, ante; *Cross v. Lewis*, 2 B. & C. 686; *Fracey v. Atherton*, 36 Vt. 508; *Wallace v. Fletcher*, 10 Foster (N. H.), 434; *Tyler v. Wilkinson*, 4 Mason (U. S.), 403.

⁷ *Wallace v. Fletcher*, 10 Foster (N. H.), 153; *Shadwell v. Hutchinson*, 4 C. & P. 333; *Tucker v. Newman*, 11 Ad. & El. 40.

⁸ In *Bradbury v. Grinsell*, 2 Wm. Saunders, 175, n, it was said that "though an uninterrupted possession

SEC. 714. Where, however, a tenant for life or for a term acquiesces in the use of the estate in a particular way, by another for the requisite period to acquire a prescriptive right, the right exists so long as his estate exists, but expires with its determination.¹

SEC. 715. Again, in order to acquire a title by prescription, the user must be peaceable and uninterrupted, and must be *acquiesced* in by the owner of the land. Therefore, where the user was the subject of frequent controversies between the parties, or if the owner *remonstrated* against the use,² or denied the right of the party exercising the use to do so,³ no right is acquired. It is not necessary that the owner of the land should resort to actual violence to resist the use, but any act which shows his positive dissent thereto to the knowledge of the person exercising the use, will defeat the acquisition of the right by defeating the presumption that arises from acquiescence.⁴

SEC. 716. The right, as previously stated, begins to run from the time when actual injury results from the user, either to property itself, or to some right, for an invasion of which an action lies. It

of twenty years or upward should be a bar in an action on the case, yet the rule must ever be taken with this qualification, *that the possession was held with the acquiescence of him who owned the inheritance.* "For," adds the learned editor, "if a tenant for a term of years, or life, permits another to enjoy an easement on his estate for twenty years or upward without interruption, and then the particular estate determines, such user will not affect him who has the inheritance in reversion or remainder; but, when it vests in possession, he may dispute the right to the easement, *and the length of possession will be no answer to his claim.*" *Blanchard v. Bridges*, 4 Ad. & El. 176; *Daniel v. North*, 11 East, 372; *Parker v. Framingham*, 8 Metc. (Mass.) 200; *Baxter v. Taylor*, 4 B. & Ad. 72; *Barker v. Richardson*, id. 579; *Davies v. Stephens*, 7 C. & P. 570; *School District v. Lynch*, 33 Conn. 334; *Cross v. Lewis*, 2 B. & C. 686; *Sargeant v. Ballard*, 9 Pick. (Mass.) 251; *Edson v.*

Munsell, 10 Allen (Mass.), 567; *Gray v. Bond*, 5 Moore, 334.

In *Perrin v. Garfield*, 37 Vt. 311, the court held that the maintenance of a mill-dam is such a matter of notoriety that knowledge of it on the part of the owner will be presumed. *Ingraham v. Hough*, 1 Jones (N. C.), 42.

¹ *Wallace v. Fletcher*, 10 Foster (N. H.), 453.

² *Bealey v. Shaw*, 6 East, 216; *Stillman v. White Rock Co.*, 3 Wood. & M. (U. S.) 549.

³ *Nichols v. Aylor*, 7 Leigh (Va.), 546; *Tracey v. Atherton*, 36 Vt. 514; *Powell v. Bragg*, 8 Gray (Mass.), 441; *Eaton v. Swanson Works Co.*, 17 Q. B. 267; *Sivett v. Wilson*, 3 Bing. (N. C.) 115; *Smith v. Miller*, 11 Gray (Mass.), 148; *Coke's Litt.* 113 b.

⁴ *Powell v. Bragg*, ante. In *Bailey v. Appleyard*, 3 Nev. & P. 157, the putting up of a rail across a path by the owner of the land, although it was soon after removed by some person, was held to be such an interruption as to defeat the right.

is also essential, in order to enable the user to ripen into a right, that the use should be continuous. But, as to what is such a continuous user as will perfect the right, is a question to be determined from the circumstances of each particular case, and is to be determined with reference to the nature and character of the right claimed. It is not to be understood that the right must be exercised *continuously*, in the strict sense of the word, without cessation or interruption, but that it is to be exercised as continuously and uninterruptedly as the nature of the right claimed requires, in order to satisfy a jury that the right claimed is commensurate with the user. Thus, in order to acquire a right of way across another's land, it is not essential that the person asserting the right should have passed over the way every day in the year or even every month in the year. It is sufficient if he has used the way as his convenience and necessity required, and that his user be such as to leave no room to doubt his intention to maintain his use of the way *as of right*.¹ But he must not suffer unreasonable periods to elapse between his acts of user. Thus it has been held, that where a party claiming a right of way over another's land to get the hay from an adjoining lot once each year, that the exercise of this right once a year, as of right, will sustain a prescriptive right *for such a use*.² But such a user would not confer a right of way for *any* purpose and at *any* time that the party might see fit to exercise it. The *continuity* must not be broken,³ and whether or not it has been, depends upon the nature of the easement claimed, and non-user in reference thereto.⁴

¹ Pollard v. Barnes, 2 Cush. (Mass.) 191; Bodfish v. Bodfish, 105 Mass. 317; Lowe v. Carpenter, 6 Exch. 630, PARKE, B.; Parks v. Mitchell, 11 Exchq. 788; Hogg v. Gill, 1 McMullen (S. C.), 359; Nash v. Peders, 1 Spear (S. C.), 17.

² Carr v. Foster, 32 B. 581.

³ In Coke's Litt. 1136, the doctrine as borrowed from Bracton is laid down as follows: "The possession must be *long, continuous and peaceable*. *Long*, that is, during the time required by law; *continuous*, that is, uninterrupted by any lawful impediment; and *peaceable*, because if it be *contentious*, and the opposition be on good grounds, the party will be in the same condition as at the beginning of his enjoyment. There must be *long use*,

without force, without secrecy, as of right, and without interruption." Here all the requisite elements to acquire a prescriptive right are concisely stated, and whether or not they exist in a given case, is a question of fact to be determined by the jury, in view of the right claimed, the manner in which it has been used, and the purpose of its use. The burden of establishing the existence of all these elements, and consequently of establishing the right, is always upon him who asserts it."

⁴ Pollard v. Barnes, 2 Cush. (Mass.) 191; Watt v. Trapp, 2 Rich. (S. C.) 136; Geranger v. Summers, 2 Ired. (N. C.) 229; Winnepegossee Co. v. Young, 40 N. H. 436; Carlisle v. Cooper, 46 E. Green (N. J.), 261.

SEC. 717. As before stated, the extent of the user and the continuity thereof must be commensurate with the nature of the right claimed, and, while one class of use will establish a right of way,¹ or a right to flow land by the erection of a mill-dam,² yet quite another and different user would be required to establish a right to send a stream of polluted air over another's premises. But, if any invasion of the rights of an adjoining owner for the statutory period can be shown, there is no question that a right to maintain an offensive trade by prescription, and to send therefrom a stream of impure air over another's premises, may be acquired by an exercise of the trade in a particular locality, as well as to establish a right of way or any other right which can be acquired by grant.³

SEC. 718. In the case of a right of way, there is an actual invasion of the *property* of another of a tangible character, and the long continuance of these invasions raises a presumption of right; but the very ground upon which the presumption rests, *is the invasion* of the land, long continued. In the case of a prescriptive right to pollute the air over another's land, the agency by which the injury is inflicted being invisible, and the damage not being visible and sensible, and the act producing the invasion being committed and exercised upon the lands of the party claiming the right, he labors under the disadvantage of being compelled not only to overcome the presumption that his acts are legal, and all the injurious consequences confined to his own land, but also of being compelled to establish the fact that, during the entire period requisite to gain the right, he has been sending over his neighbor's land a contaminated and polluted atmosphere from his works, and that, during all that time, the

¹ Carr v. Foster, 3 Q. B. 58.

² Wood v. Kelly, 30 Me. 47; Winnipesogee Co. v. Young, 40 N. H. 436; Gleason v. Tuttle, 46 Me. 288.

³ Bliss v. Hall, 5 Scott, 500, candle factory; Ric de D., 4 Assize, pl. 3, p. 6, Gale on Easements, 187, lime kiln; Roberts v. Clarke, 18 L. T. (N. S.) 48, brick kiln; Elliottson v. Feetham, 2 Bing. (N. C.) 134, iron manufactory, opinion of PARKER, J.; Dana v. Valentine, 5 Met. (Mass.) 8, slaughterhouse, soap boilers and candle factory;

Charity v. Riddle, 14 F. C. (Sc.) 340^a glue works; Duncan v. Earl of Moray, 15 F. C. (Sc.) 303, fuileze pits; Colville v. Middleton, 19 F. C. (Sc.) 439; Miller v. Marshall, 5 Mur. (Sc.) 32; MILLER, J., in Tipping v. St. Helen Smelting Co., 11 H. L. Cas. 648; Flight v. Thomas, 10 Ad. & El. 590, offensive smells from mixen; Howell v. McCoy, 3 Rawle (Penn.), 256, pollution of water by tannery; Cooper v. Hubback, 12 C. B. (N. S.) 456.

atmosphere has been polluted to an extent equal to that complained of. He loses entirely the benefit of that presumption which is raised in favor of long possession, which exists when the right is exercised by a direct visible invasion of property, and where the injuries are direct and visible, and, instead, is burdened with overcoming that other equally strong presumption, that his acts, having, so far as any thing was visible, been confined to his own property, were lawful, and confined, in all their injurious consequences, to his own land; therefore, as has previously been stated, while it is *possible* that such a right may be acquired, yet the difficulties attendant upon its establishment are so great, that, *practically*, it can seldom be done.¹

SEC. 719. It should be stated that, in proving a right of this character, the right will not be defeated, because the use of the trade, in favor of which the right is claimed, has been slightly, partially, or occasionally varied, if there has been no substantial change or variation that can be said, in view of all the facts and circumstances, to affect the 'relative rights of the parties prejudicially, or to produce a sensible change in its invasive quality or character. The idea was well illustrated by LITLEDALE, J., in *Rex v. Archdall*, when he said, speaking of the effect of 'slight changes in the uses of property as affecting prescriptive rights: "It follows, almost necessarily, from the imperfection and irregularity of human nature, that a uniform course is not preserved during a long period; a little advance is made at one time, a retreat at another; something is added or taken away, from indiscretion or ignorance, or through other causes; and when, by the lapse of years, the evidence is lost which would explain these irregularities, they are easily made the foundation of cavils against the legality of the whole practice. So, also, with regard to title; if that which has existed for an immemorial period be scrutinized with the same severity which may properly be employed in canvassing modern grants, without making allowance for the changes and accidents of time, no ancient title will be found free from objection. It has, therefore, ever been the well-established

¹ *McNab v. Adamson*, 6 U. C. Rep. 100, where an excess of user was held actionable.

principle of our law, to presume every thing in favor of long possession." The rule, as announced by the learned judge, was intended to have application entirely to that class of cases where the right claimed was one predicated upon an actual, personal and visible occupancy of property, yet it furnishes a fair rule in any case. But it is evident, from the tenor of *all* the cases, that proof of the exercise of a right *less* than that claimed, will not uphold the right.¹ It may be larger, for the greater includes the less, but it cannot exist where the former use has been substantially less than that complained of.²

SEC. 720. The difficulty incident to the acquisition of such a right was hinted at by Sir G. J. TURNER in the case of *Goldsmid v. The Tunbridge Wells Improvement Co.*, 1 L. R. (Eq. Cas.) 352, which was an action for an injunction to restrain the defendants from discharging the sewage of *Tunbridge Wells* into *Calverley Brook*. It appeared that the plaintiff was tenant for life of an estate through which the brook flowed, and that for a period of more than fifty years (see report of the same case, L. R. [Eq. Cas.] 166) the sewage from Tunbridge Wells had been poured into this brook. The plaintiff's estate was some two miles and a half from the town, and, when he came into possession of it, the water was fit for domestic use; but, owing to the growth of the town, and the consequent increase of the sewage, the water of the brook, at the time when the bill was brought, was not only unfit for use for domestic purposes, but was so polluted that it communicated a noxious and unwholesome odor to the atmosphere that floated over the estate. Upon the hearing it was urged, by the plaintiff, that unless the nuisance was restrained, the defendants would acquire a prescriptive right to pollute the water, and his rights and his remedy would be lost. In commenting upon this branch of the case, the LORD CHANCELLOR said: "It was

¹ *Bailey v. Appleyard*, 3 Nev. & P. 172; *The Bailiffs of Tewksbury v. Bricknell*, 1 Taunt. 142. In *Welcome v. Upton*, 6 Mees. & Welsb. 540, ALDERSON, B., in discussing the question as to whether, where the user was not substantially as great as claimed, where the difference was so slight as to be of no materiality, put this perti-

nent inquiry: "Would the claim of a party to a right of way be defeated by showing that some person had narrowed it by a few inches?"

² *Goldsmid v. The Tunbridge Wells Improvement Co.*, 1 L. R. (Eq. Cas.) 348; *Welcome v. Upton*, 6 M. & W. 540; *Ball v. Ray*, 8 L. R. (Ch. App.) 467.

suggested, on the part of the plaintiff, that unless this court interposed, a prescriptive right to discharge this sewage into the stream, to the prejudice of the plaintiff's estate, might be acquired by the defendants; to which it was answered, on the part of the defendants, that such prescriptive right, if it could be acquired at all, had already been acquired by them. I am of the opinion that the defendants have not acquired any such prescriptive right. I assume, but without giving any opinion upon the point, that such a right may well be acquired; but then, I think it could only be acquired *by a continuance of the discharge of the sewage, prejudicially affecting the estate, at least to some extent, for the full period of twenty years*, and I think the evidence sufficiently shows that the discharge has not *prejudicially* affected the estate for so long a period."

Here, then, the real test as to what is necessary to support a prescriptive right to interfere with any of the elements going to another's land is given. It must be proved, in order to support the right, that the user, in whose behalf it is set up, has *prejudicially* affected the property for the full period of twenty years. When this is established, the right is made out; and if the plaintiff claims that the nuisance has been *increased*, the burden is shifted, and he is charged with the burden of proving the excessive use.¹

SEC. 721. When a prescriptive right is once acquired to pollute either the atmosphere or the waters of a stream, the party acquiring the right is not restricted to an exercise of his trade in a manner precisely similar to that in which he has exercised it for the period during which he acquired the right, but he may make any such reasonable and proper changes in his use thereof as his tastes or interests may require, provided he does not thereby *increase* the pollution, and the injury and damage resulting therefrom.² But he must make no change that will produce an injury of a *different* character from that previously produced; if he does, his use is not protected by prescription.³

¹ Ball v. Ray, 8 L. R. (Ch. App.) 267; Baxendale v. Murray, 2 id. 790; Goldsmid v. Tunbridge Wells Improvement Co., 1 L. R. (Eq. Cas.) 166.

² Baxendale v. Murray, 2 L. R. Ch. App. 790; Stein v. Burden, 24 Ala. 130.

³ Ball v. Ray, 8 id. 267.

But for all injuries resulting from the *same* use he is protected, as well as for all injuries that result because of a change in the character or manner of use to which the premises *affected* thereby have been put after the right is acquired.¹

SEC. 722. The principles announced in the preceding section are fully sustained by Lord CAIRNS, L. J., in the case of *Baxendale v. Murray*, *ante*. In that case the plaintiff was the owner (for a term of twenty-one years) of a dwelling-house and ornamental grounds called "*Scotsbridge House*," on the river *Chess*. Above him on the stream were two paper-mills owned and operated by the defendant, one of which was about two miles up the stream, and the other, called the "*Scotsbridge Mill*," within about 200 yards of the plaintiff's grounds. These mills were *ancient* mills, and had been operated in that locality for many years, and for a period of much more than twenty years had been worked for the purpose of converting rags into paper, and had during all that period discharged the refuse therefrom into the river *Chess*. Some time in the year 1861 the defendant began to use the Spanish grass called esparto, as a raw material, either alone or with rags; the esparto being washed, macerated, boiled, and made into the material called "half-stuff," which is subsequently converted into paper. The result of the evidence was, as found by the court, that the mills in use when the bill was filed were the same in number and extent as during the first twenty years of their use, and that the whole quantity of raw material used was not greater than formerly; that the operation upon the same material of the chemical agent latterly used (caustic soda) was not shown to be substantially different from that of the alkali and lime formerly used, though it was alleged that the effect of the chemical agent on esparto was different from its effect on rags.

Lord Justice CAIRNS, in giving the opinion of the Court of Chancery Appeals, said: "Does the use of a new material in the manufacture of paper, from the mere circumstance that the material is new, and different from that formerly used, destroy the right previously possessed by the defendant to discharge polluted water into the stream? I doubt if the question on this part of

¹ *Crossley & Sons v. Lightowler*, 3 L. R. Eq. Cas. 267.

the case is one so much of law as of fact. The question appears to me to be, what is the right or easement of the defendant? Is it a right specific and defined, to pollute the stream by discharging the dirty water in which rags have been washed? Or, is it a right to discharge into the river the refuse, liquor and foul washings produced by the manufacture of paper at his mills in the reasonable and proper course of manufacture, using the materials that are proper for the purpose, but not increasing as against the servient tenement to any *substantial* or *tangible* degree the amount of pollution? In my opinion, the right of the defendant would, upon the facts before us, be found, and properly by a jury be found to be the latter, and not the former right. It is difficult to suppose the existence of an easement founded on, and limited to, the washing of rags. If made specific in this way, it would be confined to the kind of rags known and in existence at the time when the right was acquired; and the rags of textile fabrics coming into use afterward must, however valuable for the manufacture of paper, be excluded. Rags, again, would afford no standard by which to test or limit the amount of pollution. Some would be much more dirty than others; the washings from some might be harmless, and from others deleterious. In rags produced from vegetable substances, the properties of the fibrous matter might be very different. In some, as in linen and cotton rags, the fibre being elaborately treated in the course of manufacture; in others, as in coarse sacking or bagging, especially of hemp or jute, the fibre retaining much more of its original character, I am, therefore, of the opinion, that it is not enough for the plaintiff to show that the defendant uses, in the manufacture of paper, a new material, different from that formerly employed. He must show, further, *a greater amount of pollution and injury arising from the use of this new material*, and the *onus* of this, of course, *rests upon the plaintiff*.”¹

§ 723. There is another proposition which should be stated here, and that is, that where a person has acquired a right by prescription to pollute the atmosphere by noxious works, or to pollute the waters of a stream by any particular process of manufacture, yet,

¹ See *Ball v. Ray*, 8 L. R. Ch. App. 267.

if he himself owns other lands within the sphere of the nuisance, and conveys them to another without reserving the right to continue his trade and pollute the air or the water as to that estate, his right is lost, and he becomes liable for all the damages resulting thereto in an action at law, and a court of equity will restrain him from the exercise of his trade in such a way as to produce injury to the estate, which, *practically*, results in a complete destruction of his right.

In *Crossley & Sons v. Lightowler*, 3 L. R. (Eq. Cas.) 279, the plaintiffs were carpet manufacturers, and carried on their business in factories situated upon the river *Hebble*. The defendants Lightowler, in 1864, became occupiers of premises, of which the defendants, Messrs. Eddleston, were the owners, on the north side of the river, and at a considerable distance from the bank, about three-fourths of a mile above the plaintiffs' mill, where they had erected, at the time when the suit was brought, some large dye-works, and were constructing others.

The plaintiffs stated in their bill that in the manufacture of their goods they required large quantities of pure water, and that the fouling of the *Hebble* by the defendants' works, which had previously been slight, their business had been greatly injured, and that on one day they were compelled to suspend work altogether. The plaintiffs alleged a right to pure water for the supply of their works, among other things, for the reason that in November, 1864, they had contracted with the Messrs. Eddleston for a strip of land lying below the defendants' works on the banks of the river, which, in January, 1865, was conveyed to them by the Messrs. Eddleston without any reservation of right to foul the stream.

The defendants denied the right of the plaintiffs as riparian owners to use the stream except subject to the rights of themselves and others to foul it, and rested their case on four grounds, two of which were as follows: First. The ownership of themselves and their predecessors of the premises on which the dye-works existed, and the maintenance of the dye-works there for upward of sixty years. Second. The use and fouling of the waters of the stream by other dye-works. Upon this branch of the case, Sir W. PAGE WOOD, V. C., said: "In regard to the purchase, I

think there would be a ground for an injunction. In order to put the point of law as I think it stands upon this branch of the case, I will assume that the right existed in the vendor (Messrs. Eddleston) in 1864. I will assume that he, as riparian proprietor, having acquired the right to pour all the water through his property into the river, in 1864, sells a strip of land in front of his works without reserving any right to pour in foul water but, what is of course much stronger, reserving a right to the use of this water for another and distinct purpose. * * * It certainly seems preposterous to me to say that a person can convey land to a riparian owner, and then claim the right of pouring his dirty water into it, if he pleases. A point has been raised which I think is not very material, but which, if material at all, I think must, upon authority, be decided for the plaintiffs, namely, whether or not half the bed of the river passed because the conveyance seemed to point to a boundary which would not include the bed of the river. The point seemed to have been distinctly decided in *Berridge v. Ward*,¹ where it was held that, though there was an actual description of the property as bounded by the high road, nevertheless half of the high road passed, according to the common law, as following the right of proprietorship. So I apprehend here the right to half the bed of the river would follow the right of the riparian proprietor to the soil, if it were necessary to decide that question. But it does not seem to me at all necessary, because there is this point, that the riparian proprietor has a right to the use of the water whenever he may want to enjoy it. It is quite true that at this moment it is not made use of by the plaintiffs for watering their cattle or for any other purpose, but they have a *right* to the user, and a right to interfere with any thing that injures that right of user in such a manner that, if not interrupted for twenty years, the person so injuring the right would acquire the title. That point has been decided by the house of lords in a recent case² reported since this case was heard (1866). A discussion upon this subject occurs in a very able article in the Jurist of September 15, where the authorities on the subject are collected. Among the rest, a case is mentioned³ where Sir A. ERLE, C. J., lays down the law thus :

¹ *Berridge v. Ward*, 10 C.B. (N.S.) 400.

² *Sampson v. Hodinott*, 1 C. B. (N.S.)

³ *Bickett v. Morris*, 1 H. L. (Sc.) 47. 590.

"It appears to us that all persons having land on the margin of a flowing stream have, by nature, certain rights to use the water of the stream *whether they exercise their rights or not*, and that they may begin to exercise them whenever they will. If the user of the defendant has been beyond his natural right, it matters not *how much* the plaintiff has used the water or whether he has used it at all in either case, his right has been invaded, and an action is maintainable." Here, for the words "beyond his natural right," I must substitute "beyond what it is lawful for any one to do who conveys land to another." That had been determined in a case¹ which was cited in argument, and went this length: that a purchaser at auction of a house which was described in the conditions as being bounded by "building grounds," was entitled to assert against the purchaser of this land from the same vendor, at the same auction, a right to prevent his building on this ground, against the house; inasmuch as whether the properties were sold together or separately, the vendor could not derogate from his own act, and therefore *any one claiming under him* could not derogate from his act — wholly irrespective of any rights that might exist in windows — whether they were ancient lights or not, or the like. The question between the parties is thus reduced to the single point, "has the defendant used the water as any riparian proprietor may use it, or has he gone beyond that limit?"

Now, in the case I have mentioned, of *Bickett v. Morris*, Lord CRANWORTH, in moving the judgment of the House of Lords, says this: "By the law of Scotland, as by the law of England, when the lands of two coterminous proprietors are separated from each other by a running stream of water, each proprietor is *prima facie* owner of the *alveus* or soil of the bed of the river, '*ad medium filium aquæ*.' The soil of the *alveus* is not the common property of the two proprietors," and so on. "The appellant contended that, as a consequence of the right, every riparian proprietor is at liberty, at his pleasure, to erect buildings on his share of the *alveus*, so long as other proprietors cannot show that damage is occasioned thereby, or likely to be occasioned to them." This, therefore, was a very strong case — that of a

¹ *Swarsborough v. Coventry*, 3 Bing. 305.

man putting impediments on his own soil in the *alveus* of a river, without any distinct evidence of any damage having been thereby occasioned. His Lordship proceeds: "I do not think that this is a true exposition of the law. Rivers are liable at times to swell enormously from sudden floods and rain, and in these cases there is danger to those having buildings near the edge of the bank, and indeed to the owners of the banks generally, that serious damage may be occasioned to them. It is impossible to calculate or ascertain beforehand what may be the effect of erecting a building in the bed of the stream, so as to divert or obstruct its natural course." Then he gives a number of reasons why that may be so, and he says: "The owners of the land on the banks of the stream are not bound to obtain, or be guarded by, the opinions of engineers or other scientific persons, as to what is likely to be the consequence of any obstruction set up in waters in which they all have a common interest. There is, in this case, and in all such cases there must be, a conflict of evidence as to the probable results of what is done. The law does not impose upon riparian owners the duty of scanning the accuracy, or appreciating the weight of such testimony. They are allowed to say, we all have a common interest in the unrestricted flow of the water, and we forbid any interference with it. This is a plain, intelligible rule, easily understood, and easily allowed, and from which, I think, your lordships ought not to allow any departure."

Lord WESTBURY concurs in this judgment entirely, and the principle one sees at once is applicable to this case. "You, as a riparian proprietor, see something done which is not at all to your detriment now, but may hereafter be greatly to your detriment, though you cannot precisely point out how or to what extent, if you do not interfere, a right will be acquired against you by which you will hereafter be affected, and you have a right to say things shall remain exactly as they were." That applies with equal if not with greater force to a case where a person says: "I am, at this moment, not using the water for the purpose of watering cattle or of wool washing, or for any other purpose, but it is to a certain extent clear and undefiled, and you are pouring into the river an immense quantity of foul water in front of my property; therefore I seek to restrain that which, in twenty years

time, will become a right. * * * There must be an injunction restraining the defendants from causing or suffering any foul water to flow from their dye-works into the river *Hebble* above, or within the limits of the land adjoining the river, purchased by the plaintiffs of the defendants, and conveyed to the plaintiffs by the defendants, etc., so as to affect the water opposite the said land to the damage and injury of the plaintiffs as owners of the said land and of a moiety of the said river opposite thereto."

SEC. 724. There can be no prescription for a *public* nuisance of any kind or description, and as to whether or not a person exercising a trade or occupation which is a public nuisance, can acquire a prescriptive right to carry on the same as against private or individual rights, is a question which, in this country, has never been definitely settled, but I think there can be no question but that as a result of all the cases, such a right is not generally recognized. In *Mills v. Hall*, 9 Wend. (N. Y.) 315, the plaintiff brought an action against the defendant for maintaining a dam, whereby the water of a stream was set back upon his premises in such a manner as to become stagnant, whereby the atmosphere was impregnated with unwholesome vapors that produced sickness in his family. The defendant set up a prescriptive right to maintain the dam so as to flood the lands in the manner charged in the declaration, and this fact was found in his favor except that it was found that he had recently constructed a new dam upon the site of the *old* one, and that, since the construction of the *new* dam the fever and ague had broken out in the vicinity, which was traced, by a loose process of reasoning, to the vapors arising from the water set back by the *new* dam.

SUTHERLAND, J., in delivering the opinion of the court, said: "There is no such thing as a prescriptive right or any other right to maintain a public nuisance. Admitting that the defendant's dam has been erected and maintained more than twenty years, and that during the whole of that period it has rendered the country unhealthy, such length of time can be no defense to a proceeding on the part of the public to abate it, *or an action by an individual for the special damage which he may have sustained from it.* If the defendants have, for more than twenty

years, been permitted to overflow the plaintiff's land with their mill-dam, so far as the injury to the *land* is concerned, they have, by that length of permission, acquired a right to use it in that manner and are not responsible in damages to the plaintiff therefor. So a man may overflow his own land, and if such overflow spreads disease and death through the neighborhood it may be abated, and he must respond in damages for the special injury which any individual may have sustained from it, and it would seem to be very absurd to contend that the defendants, in a case like this, would have greater rights or immunities."¹

SEC. 725. In *Regina v. Brewster*, 8 Up. Can. R. (C. B.) 208, a similar question arose under a prosecution for maintaining a dam, whereby a large tract of country was flooded, and, the water becoming stagnant, emitted unwholesome gases, that spread disease in the vicinity, and where, also, the water flooded a highway. In that case, the defendant set up a prescriptive right to maintain the dam; but DRAPER, C. J., said: "It was urged at the trial that the dam had been erected for more than twenty years. For the purpose of establishing an easement, affecting *private* rights of others, this would be sufficient, generally speaking, but it is not so when the consequences of this act are a public nuisance."

SEC. 726. In *Rhodes v. Whitehead*, 27 Tex. 304, it was held, that no prescriptive right can be acquired to maintain a public nuisance, and that if the damming up of water, though in pursuance of a prescriptive right, creates or causes such annoyance as seriously to impair the comfortable enjoyment of property by reason of noxious smells, or as causes sickness in the immediate neighborhood, it is a private nuisance also, and actionable as such at the suit of any person who suffers special damage therefrom. The reason is, that, being a *public* offense, it is unlawful in its

¹ Taylor v. People, 6 Parker's Cr. (N. Y.), 524; Elkins v. State, 3 Humph. 368; Com. v. Upton, 6 Gray (Mass.), 475; Howell v. McCoy, 3 Rawle (Penn.), 256; Weld v. Hornby, 7 East, 199; Com. v. Mettenberger, 7 Watts (Penn.) 69; Fowler v. Saunders, Cro. Jac. 446; Mills v. Hall, 9 Wend. (N. Y.) 315; People v. Cunningham, 1 Denio 18 N. J. 305.

inception and in its continuance, and, being unlawful to the public in its aggregate capacity, it can never become lawful by any length of exercise against the individual members of the public. But this must be understood subject to this qualification, that a prescriptive right may be acquired as against individual rights, by the exercise of a trade that is a public nuisance in all respects, except that which makes it a public offense.

In *Mills v. Hall*, the dam of the defendant was declared a public nuisance, in that it set the water back and rendered it stagnant, whereby it bred disease in the neighborhood, and, for those results, the court said it was a nuisance, both indictable and actionable; but, nevertheless, it was an *actionable* nuisance only to that extent. The owners of land flooded by the water could not maintain an action for that injury, because to that extent the defendant had acquired a right against them by long user.

In *Regina v. Brewster*, the same doctrine was held, as also in *Rhodes v. Whitehead*, and the doctrine of these cases, although evidently reached without any very elaborate process of reasoning, and without any particular thought as to their result, nevertheless embody the law as recognized in the courts of this country, and are supported by principle and authority.

SEC. 727. Where a nuisance, producing no tangible or sensible injury to the property itself, is located in the vicinity of vacant lands, or lands not laid out or used for building purposes, no prescriptive right is acquired except by twenty years' user after the land has been laid out into building lots, or actually built upon.¹ No actionable injury can be said to have occurred until the land has been applied to some beneficial purpose; nor then, unless the nuisance is so extensive as to impair the comfortable enjoyment of the property, consequently, no right can be acquired, except as before stated, for no cause of action accrues.

SEC. 728. We have not the space to pursue this matter further, and will close this chapter by saying, that when a prescriptive right is once acquired, it cannot generally be lost, except by a

¹ *Peck v. Elder*, 3 Sandf. (N. Y. S. C.) 126, where it was held that the diminution of the value of building lots by a nuisance forms good basis for an action. *Dana v. Valentine*, 5 Metc. (Mass.) 1; *Brady v. Weeks*, 3 Barb. (N. Y. S. C.) 156.

non-user for a period equal to that required to gain it,¹ and an adverse user by the owner of the estate. The neglect to use the right is merely evidence from which an abandonment may be presumed; but, unless accompanied by an adverse user, it may be rebutted and explained in such a way as to support the right.²

¹ *Dyer v. Sanford*, 9 Metc. (Mass.) 395; *Crossley v. Lightowler*, L. R. (Eq. Cas.) 292; *Veghte v. Canal Co.*, 4 C. E. Green (N. J.), 156; *Hilary v. Walker*, 12 Ves. 239; *Doe v. Hilder*, 2 B. & Ald. 791.

² In *Ward v. Ward*, the question as to the effect of non-user came up in an action of trespass *quare clausum*. It appeared that the defendant's predecessors had formerly used the way, for entering upon which this action was brought, for a period of more than twenty years, but the way had been disused since 1814 by reason of the defendant's predecessors having hired a shorter way of the plaintiff. The plaintiff insisted that, by this non-user for more than twenty years, the right to the old way by prescription was lost, the presumption being that the way was abandoned. ALDERSON, B., said: "The presumption of abandonment cannot be made from the mere fact of non-user. There must be other circumstances in the case to raise the presumption. The right is acquired by *adverse* enjoyment. The non-user, therefore, must be the consequence of something which is adverse to the user." The *non-user* may be explained, as by showing that the person had no occasion for it, and, unless there is an adverse user by the owner of the estate, or such a state of facts as clearly indicate an abandonment, it cannot be predicated of non-user alone. *Corning v. Gould*, 16 Wend. (N. Y.) 535; *Farar v. Cooper*, 34 Me. 400; *Hatch v. Dwight*, 17 Mass. 489; *Witzell v. Paschall*, 3 Rawle (Penn.), 82. In *Jennison v. Walker*, 11 Gray (Mass.), 425, there was an express grant to lay an aqueduct through the plaintiff's land, but the defendant's grantors having ceased to use it, and the plaintiff having taken

up the logs and done other acts adverse to the right for a period of thirty years, it was held that the right was lost. See *Wiggins v. McCleary*, 49 N. Y. 346; *Bannor v. Augier*, 2 Allen (Mass.), 128; *Arnold v. Stevens*, 24 Pick. (Mass.) 106; *Smiles v. Hastings*, 24 Barb. (N. Y.) 44; *Pope v. O'Hara*, 48 N. Y. 446; *Owen v. Field*, 102 Mass. 114; *Hoffman v. Savage*, 15 id. 130; *Butz v. Thrie*, 1 Rawle (Penn.), 218. And the same elements of enjoyment by the servient owner and acquiescence by the dominant owner must exist, as in the case of acquiring the original right. *Yeakle v. Nace*, 2 Whart. (Penn.) 123; *Hayford v. Spokesfield*, 100 Mass. 491. In *Coke's Litt.* 1146, the rule adopted by the courts is laid down thus: "The title, being once gained by prescription or existence, cannot be lost by interruption of possession for ten or twenty years, *but by interruption of the right*." But, it seems that *time* is not so much an element on the question of the abandonment of an easement as in gaining it. Lord DENMAN, in *Regina v. Chorley*, 12 Q. B. 515, says: "We apprehend that an express release of the easement would destroy it at any time, so the *cessor of use*, coupled with any act clearly indicative of an *intention to abandon the right*, would have the same effect." A similar rule was held in *Railroad Co. v. Covington*, 2 Barb. (N. Y.) 532, where a railroad company, having an easement to maintain a railroad over one's land, took up the rails and ceased to use it, and conveyed the road-bed to other parties, the court held that this operated as an abandonment of the easement, although the non-user had been for but a short period.

CHAPTER TWENTY-FIRST.

ABATEMENT OF PUBLIC NUISANCES BY ACT OF PRIVATE PERSONS.

- SEC. 729. Private person cannot abate a public nuisance.
 730. Any person who sustains special injury from, may.
 731. Instances of nuisances that cannot be abated.
 732. *Meeker v. Van Rensselaer*.
 733. Abatement of buildings. *Jones v. Williams*.
 734. *Davis v. Williams*.
 735. *Harvey v. Dewoddy*, and other cases reviewed.
 736. *Burnham v. Hotchkiss* reviewed.
 737. No purely public nuisance can be abated by private persons.

SEC. 729. A private person may not of his own motion abate a strictly public nuisance under any circumstances. The offense is one which can only be reached and prevented by indictment or by proceedings in equity at the suit of the people by its proper officers.¹

In view of the many loose expressions that have been incorporated into the opinions of courts when deciding questions of this character, and of the gross errors committed by nearly all of the elementary writers who have treated upon this subject in laying it down as a rule of the law, that "a public nuisance may

¹ *Brown v. Perkins*, 12 Gray (Mass.), 89; *Griffith v. McCollum*, 46 Barb. (N. Y. S. C.) 561; *Moody v. Supervisors*, id. 659; *Ely v. Supervisors*, 36 N. Y. 297; *Gray v. Ayers*, 7 Dana (Ky.), 375; *Harrower v. Ritson*, 37 Barb. (N. Y. S. C.) 301; *Barclay v. Commonwealth*, 25 Penn. St. 503; *Blodgett v. Syracuse*, 36 Barb. (N. Y. S. C.) 526; *State v. Keenan*, 2 Ames (R. I.), 497; *Welch v. Stowell*, 2 Doug. (Mich.) 332. In *Blacks. Com.* vol. 3, p. 216, that learned commentator says: "*Public or common nuisances are those which affect the public, and are an annoyance to all the king's subjects*" and doubtless from following out this definition of the subject, all the inconsistencies in reference to the abatement of public nuisances by individual action, have arisen. But this definition has been essentially modified by the courts since Black-

stone's time, and it has now come to be understood that a public nuisance does not necessarily consist in an act or thing which does, *in fact*, annoy all the public, but in that which *may* annoy all who come in contact with it, and that for all purely public nuisances, the only legal redress is by indictment, while for *private* and *special* injuries *only*, sustained by individual members of the public, can redress be had, either by abatement at the mere motion of an individual or by a private action for damages, and that a right of action must always exist as a condition precedent to an abatement at the hands of a private person.

But see *Gunter v. Geary*, 1 Cal. 462, where the court say that any person in the community may abate a public nuisance although it causes him no immediate damage.

be abated by any person," the foregoing proposition may seem unwarranted, but whatever general notions may exist to the contrary, it is sustained by the judgment of every respectable court, and is the law both in this country and in England. It must be borne in mind that a public nuisance strictly, is one that produces a common injury and damage to the public, so that one person cannot be said to sustain any special or particular damage apart from the rest of the public, and that a mixed nuisance is one which is both public and private. That is, a nuisance that while it produces injury and damage to so many persons that it is indictable as a public offense, at the same time inflicts a special and particular damage upon one or several individuals apart from and in excess of the common injury, so that at the same time the persons so injured may sustain actions for the damage sustained by them.

SEC. 730. Any person who sustains a special injury or damage from a public nuisance to an extent that will support an action at law, may abate the same of his own motion, doing no more damage than is necessary to protect his rights and prevent a recurrence of damage from the nuisance abated.¹

¹ *Brown v. Perkins*, 12 Gray (Mass.), 83; *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44; *Lansing v. Smith*, 8 Cow. (N. Y.) 146; *Pierce v. Dart*, 7 id. 609. In *Fort Plain Bridge Co. v. Smith*, supra, the court say: "But assuming that this is a public highway and that the bridge is an obstruction to navigation and therefore a public nuisance, yet no one has the right to abate it, or sustain an action for damages unless he has himself sustained some damage not sustained by the rest of the community. If the plaintiff's business was navigating the river, or if the new bridge endangered the safety of the plaintiff's bridge, then a right of action to restrain the erection or for damages might be maintained depending on the nature of the injury done or apprehended."

In *Morris v. Nugent*, 7 Car. & Pay. 572, DENMAN, J., said: "To justify the shooting of another's dog, it is not sufficient to show that he is of a ferocious disposition and at large (and thus a public nuisance). To justify the

shooting, he must be *actually attacking the party at the time*." *South Carolina Railroad Co. v. Moore*, 28 Ga. 398. In *Selman v. Wolfe*, 27 Texas, 68, the court say: "The obstruction of a navigable river constituting a highway is a public nuisance, and may be abated by a person who is thereby injured in his rights." *Arundel v. McCulloch*, 10 Mass. 70. In *Hopkins v. Crombie*, 4 N. H. 520, it was held that an obstruction in a highway could not be abated by an individual unless it actually obstructed the passage. In *Moffett v. Brewer*, 1 Iowa, 348, it was held, that in order to justify a person in removing any nuisance, it must appear that the nuisance was a particular injury to him and operated prejudicially at the time of its abatement by him.

In *Lancaster Turnpike Co. v. Rogers*, 2 Barr (Penn.), 114, it was held that a nuisance in a highway might be abated by any person, and a private nuisance might be abated by any person whose property is injured.

In *Rogers v. Rogers*, 14 Wend. (N.Y.)

The question as to how far a private person may go in the abatement of a public nuisance is one which has been the subject of much perplexity and apparent conflict of doctrine in the courts. I say apparent, for although many of the elementary writers upon the subject have laid it down as the law that any person may abate a public nuisance, and *dicta* to that effect is to be found in many of the cases, yet I do not think that any cases really warrant this statement in the sense in which it is generally understood, or to the extent which most of the elementary writers have given it. This confusion and error has resulted from a failure to keep in view the distinction between a public and a mixed nuisance, a failure to properly classify and distinguish between them. Without making and observing this distinction, errors will constantly and necessarily arise, and the cases will appear contradictory, and the law be in apparent confusion, when in reality there is no real conflict or confusion.

SEC. 731. A common scold is a common nuisance, yet no one ever dreamed that the fact that she was a common scold, and therefore a common nuisance, would justify one in pulling out the woman's tongue, or doing her any other bodily injury as a means of abating the nuisance.

The keeping of a disorderly house is a common nuisance, but no court has ever yet held that any person would be justified in entering the house and driving out the inmates, destroying their furniture, or doing any injury to their property or persons.

The exhibition of a stallion in a public place has been held to be a public nuisance, yet no one has any idea that a court would

131, it was held that a person could not abate a nuisance in a highway unless it operated as an obstruction to travel. In this case the nuisance consisted in a deposit of a quantity of ashes in the highway near the defendant's dwelling. The defendant removed them, placing five or six bushels of them in his own lots. The court held that his action was unwarranted. *Dimes v. Petley*, 15 Q. B. 283; *Davies v. Mann*, 10 M. & W. 546; *Mayor of Colchester v. Brook*, 7 G. B. 377; *Bateman v. Bluck*, 18 id. 870; *Selman v. Wolfe*, 27 Texas, 68.

In *State v. Parrott*, 71 N. C. 311, the owners of a steamboat running upon a navigable river, having given notice to a railroad company which had erected a bridge across the river, to provide proper draws for the same, and the company having neglected to do so, the owners of the boat having arrived at the bridge with their boats, and being unable to pass, tore down a part of the bridge, and passed through with their boat. On an indictment against the steamboat owners for the abatement, the court held that their acts were lawful and fully justified. Because a bridge across a stream is worthless, decayed and dangerous, an individual has no right to destroy it. *Owens v. State*, 52 Ala. 400.

justify a person in assaulting the person exhibiting the horse, or in killing the horse itself; and so with a multitude of other acts or things, which we will not stop here to enumerate. Yet if the doctrine laid down in the elementary works, and cropping out in the loose *dicta* of some of the cases, was really the law, carried out to its legitimate results, it would warrant acts of violence and barbarity, such as no civilized community could tolerate, and such a condition of anarchy and disorder as would be wholly in subversion of law and the public peace. But no such condition of things can arise, for the law will not uphold or tolerate it. The public, through the intervention of the law as administered by the courts, avenges its own injuries, and remedies its own wrongs. No individual, under any circumstances, is justified in abating a purely public injury, and should he attempt the experiment, he would find himself involved in serious consequences.

Again, no one ever entertained an idea that a manufactory that by reason of its operations produced such noxious smells and vapors as to produce a public injury, and became a nuisance, was at the mercy of any person who might see fit to enter into and destroy its machinery. If such were the rule, a stranger, who suffered no inconvenience from its operations, a resident of another city, town or State even, might with impunity, from motives of malice or mischief, prey upon the manufacturing or other interests of a community *ad libitum*. Such would be the legitimate fruits of the doctrine, and the law would thus be converted into a shield to be used by any man or set of men, who desired to gratify either their malice, or propensities for mischief.

But no case has ever warranted any such doctrine. The courts with some few exceptions, which will be noticed hereafter, have always exercised the highest and most rigid caution in cases involving these questions.

There are a class of cases where the injury was of a mixed character, as the obstruction of a highway or navigable stream, where the obstructions have been of such a character as to interfere with travel over them, in which the courts have held that any person might abate the obstruction. But this has been predicated upon the idea that every person has an equal right to an unobstructed passage over a highway or navigable stream, and

that any obstruction of that is the obstruction of the right of every person in an equal degree, whenever he chooses to exercise it. To this extent some of the early cases have gone. But beyond that they have not gone, if so, in isolated cases, it has been upon special grounds and for special reasons, that seemed to be warranted by the peculiar circumstances of the case.

SEC. 732. The case of *Meeker v. Van Rensselaer*, 14 Wend. 397, is frequently cited in support of the general doctrine that any public nuisance may be abated by any person, but an examination of the case shows that it does not warrant the doctrine; neither will it warrant the doctrine that a house in such a condition will, at all times, or indeed at any time, except under peculiar circumstances, be a nuisance even. In that case the defendant, with others, citizens of the city of Albany, during a season when the Asiatic cholera was prevailing to an alarming extent in the country, and when the highest degree of care in the sanitary condition of every building, whether in city or country, was essential to prevent the approach of the disease, pulled down a tenement house belonging to the plaintiff. The house was cut up into small tenements, and was occupied by a large number of the poorest classes in the community, who suffered the premises to remain in such a filthy condition as to justify serious apprehensions on the part of citizens, even in ordinary times, of its deleterious effects upon the health of the community, but which, especially at a time when this fearful epidemic was devastating the country, was as much a source of danger to the health and lives of the people of the city, or any person coming to it, as a powder magazine, with a burning torch suspended in close proximity to its explosive and death-dealing contents. The defendant in this case was a resident and alderman in the Fifth ward of the city of Albany, and was *directly* and *personally* interested in the preservation of its health, and in the promotion and improvement of its sanitary condition. He justified his conduct in the premises, upon the ground that the building in the manner in which it was used, and the condition that it was in, was a public nuisance, and dangerous to the lives and health of the city. The court held that, under these circumstances, the house was

a public nuisance, and that the defendant was justified as one of the public in abating it; and SAVAGE, J., said, "*as a citizen of the Fifth Ward, the defendant was interested in preserving the public health, and especially as an alderman, he was fully justified in all he did.*" They found that the defendant had a personal interest in the abatement of the nuisance, and there is not a word in the opinion of the court that indicates that if he had had no interest, the act would have been justified. But apart from the peculiar and extraordinary circumstances that existed, the extreme peril in which it involved the inhabitants of the city, which could not wait the laws' delay, the proceedings resorted to by the defendant could not have been justified. The *house* was not necessarily a nuisance; it was only the *use* to which it was put, and the condition in which it was allowed to remain as to cleanliness, that made it obnoxious to the law, and under ordinary circumstances it would have been incumbent upon the defendant to have given notice to the owner to change the character of its occupancy and its condition, before he would have been justified in *tearing it down*.

SEC. 733. In *Jones v. Williams*, 11 M. & W. 176, PARKER, B., discusses this very question, and ably reviews the authorities bearing upon this point, and after stating the instances in which notice must be given, he said: "But it may be necessary in some cases where there is such immediate danger to life or health as to render it unsafe to wait, and make it lawful to remove without notice." This being the rule, the case under consideration came fairly within its provisions.

But the house was occupied at the time by some forty or fifty persons, and the rule in reference to the abatement of nuisances is, that it must be done without riot or danger to the public peace. And there is still another rule, that a house cannot be torn down while any one is actually occupying it. In *Perry v. Fishowe*, 8 Ad. & El. 757, this question arose where the building itself was the nuisance. This was an action of trespass for pulling down the plaintiff's dwelling-house, while the plaintiff and his family were in it. The defendant justified upon the ground that he had a right of common upon the

"*locus in quo*," for the pasture of his sheep, and that the house interfered with this right. The court held that the house was a nuisance as claimed, but Lord DENMAN in delivering the opinion of the court, said: "While the plaintiff might have pulled down the house, yet he could not do it while any one was in it; for it is well understood that no man may abate a nuisance in such a way as to disturb the peace." In a later case, that of *Burling v. Reid*, 11 Q. B. 904, the court held that where a dwelling-house was a nuisance by reason of its violation of one's rights, the person might, after reasonable notice and a request to the party occupying it, to remove it, pull it down, even though the party is actually inhabiting and present in it at the time. But the court based its decision upon the ground that a reasonable notice had been given, and a request made of the plaintiff to remove it himself, and in this respect differed from the case of *Perry v. Fishowe*.

SEC. 734. In *Davies v. Williams*, 16 Q. B. 546, the question again came before the courts, and while the court in this case, as in that of *Burling v. Reid*, adopted the doctrine of *Perry v. Fishowe*, in cases where no notice or request to remove existed, yet it held that where a dwelling-house was an obstruction to a right, and the person occupying it neglected to remove after reasonable notice and request to do so, the house might be torn down while he was actually in it. The case of *Meeker v. Van Rensselaer* cannot be tortured into the support of the idea that any person may abate a public nuisance, whether he has an interest in the matter or not. There is nothing in the case that warrants such a doctrine. The case stands upon peculiar grounds, and except for the peculiar and extraordinary facts of the case, the action of the court would have been wholly unjustifiable. The epidemic was spreading through the country with rapid strides, carrying terror and death in its path. The highest degree of cleanliness was rendered absolutely indispensable as a precautionary measure to prevent its fearful ravages. This tenement was in its occupancy and condition a direct invitation to the approach of the disease. Instant action was necessary. Suits to eject the tenants would cause delay, and resort to

such proceedings would not be of any avail. The mischief would ensue before the necessary legal steps were completed, and the very purpose of the law in conferring this "summary method of doing himself justice" would have been defeated. The defendant being a resident of the city, and within the sphere of the dangerous effects to be apprehended from this nuisance, was fully justified in all he did.

SEC. 735. In *Harvey v. Dewoody*, 18 Ark. 252, the court, in rendering its opinion in the case, among other things say, "it seems that any person may abate a common nuisance," but an examination of the case shows that no such question really arose or was decided in the case. It is merely one of those loose and careless expressions which courts sometimes make without thinking that they will be tortured into the establishment of a general doctrine. This was an action against the mayor, common council and constable of Des Arc for pulling down a house belonging to the plaintiffs, standing in a thickly settled part of the city, which authorized the removal of public nuisances by the officers who, in this instance, committed the act charged in the plaintiff's complaint. The court held that the building was a public nuisance by reason of its being unoccupied by the plaintiff or his tenants, and because it was used by others in such a way as to make it an annoyance to the public, by endangering their lives and property by fire. The defendant gave the plaintiff notice to remove the house, which he neglected to do, and having given him the time specified in the ordinance, they went on in pursuance of its provisions and removed the house. The court held that their action was legal and justifiable under the ordinance. And the court was right, because the legislature having clothed the city government with power to provide for the removal of public nuisances within the city limits, it was competent for the city government to designate by ordinance what officers should perform the duty, and they were protected in all they did within a reasonable exercise of their powers. But if the removal had been effected by private persons, having no special interest at stake, and whose rights were in no wise jeopardized by the building, it is quite evident from the language of the court that they

would not have held that they were justified, because "any person may abate a public nuisance." A house, when it becomes a nuisance, may be pulled down, as well as a fence, or a shed, or a barn. The fact that it is a house does not give it any more immunity from the exercise of this right on the part of persons specially injured thereby than any other class of property. This was held by Lord RAYMOND in *Rea v. Pappineau*, 1 Strange, 688, and in all the authorities cited *infra*. The case of *Dewey v. White*, 1 Moody & Malkins, 56, is often cited in support of this right. That was an action of trespass against the defendants, who were firemen, for pulling down a stack of chimneys in the vicinity of a conflagration, whose condition was such as to endanger the safety of those in extinguishing the fire, the defendants among the rest. The court held that the chimneys in the condition in which they were, and under the circumstances, were a nuisance, and that the defendants were justified in pulling them down. This is clearly within the rule, for any thing which endangers the safe passage of people along a public street is a mixed nuisance. It may or it may not inflict actual injury and damage upon a person exercising his right of passing along the street, but every person has a right to absolute safety in that respect, and every thing clearly in violation of that right may be abated, upon the principle that a person need not wait until the damage is actually inflicted, where the injury involves the safety of one's life or person. Such a nuisance violates the rights of individuals as well as of the public, as much as an actual obstruction of a highway. In vol. 1, p. 829, of Bishop's Criminal Law, the author says: "If the nuisance is a private one, persons whose interests are prejudiced by it may, without resorting to legal proceedings, go upon the ground and abate it. If it is a public nuisance it may be abated by any one," and he cites *Renwick v. Morris*, 7 Hill (N. Y.), 575; *Arundel v. McCulloch*, 10 Mass. 70; *Wetmore v. Tracy*, 14 Wend. 250; *Hall's Case*, 1 Mod. 76; *Low v. Knowlton*, 26 Me. 128, to support his statement. *Renwick v. Morris*, referred to, was an action of trespass against the defendants for cutting away a part of a dam erected by the defendant across the Harlem river under an act of the legislature, and the defendant, with others who were interested

in the navigation of the river, justified the act on the ground that the dam was a public nuisance, and obstructed *him*, with others, in the free navigation of the river. The court says, "that the act of the legislature does not prevent its being abated in the usual way by individuals, at the peril of showing that it was a nuisance, and that they did no unnecessary injury in removing it." The question as to whether a stranger, having no interest in the navigation of the river, might have abated the obstruction, was neither raised nor decided in the case.

Arundel v. McCulloch, 10 Mass. 70, was an action of trespass for cutting down and tearing away a bridge within the town of Arundel. The defendant cut down the bridge because it was a nuisance, and obstructed him in the navigation of the river, and justified upon that ground. The court says: "And it is clear that when any public way is unlawfully obstructed *any individual who wants to use it in a lawful way*, may remove the obstruction."

Wetmore v. Tracy was an action of trespass against the defendant for tearing down a fence erected by the plaintiff in the center of the beaten track of the highway, and the defendant justified upon the ground that it was a complete obstruction of the highway, *and obstructed him, with others who assisted in its removal*, in their passing over the road. It is true that NELSON, J., among other things, says: "Any person may abate a public nuisance," and he cites 2 Burns, Justice, p. 563, and Hawkins, p. 408, § 61, as authority for the statement. Hawkins says no such thing in the section referred to. He simply says, "In what manner all other annoyances obstructing the highway are to be removed, it seems clear that, by the common law, *any one may abate a nuisance to a highway*," and the section referred to in Burns, Justice, refers to the above section from Hawkins as his authority. It is true the learned judge says that "the question was discussed in *Hart v. The Mayor, etc.*, 7 Wend. 589, and that no doubt was expressed about the right." But no such point was decided by the court in *Hart v. The Mayor of Albany*, and they put the decision upon the express ground that the defendant was *an aggrieved party*, and as such had a right to remove the obstruction, and the head-notes to the

case, says: "Whether *any person* can abate a public nuisance, *Quere?*"

Jacob Hall's case, 1 Modern, 76, the question was not only not raised, but no such doctrine or question was hinted at in the case, as will be seen by reference to chapter 2, where that case is fully reviewed under the head of *bowling alleys*.

It is by such reckless statements made by elementary writers, and loose expressions made by courts, that are wholly unwarranted, and not decided in the cases in which they are made, and which are in no measure supported by the authorities cited by them, that the idea has become prevalent that "any person may abate a public nuisance."

SEC. 736. In *Burnham v. Hotchkiss*, 14 Conn. 310, WILLIAMS, C. J., says: "We consider it well settled that a common nuisance may be abated by any person," but when we come to examine the authorities to which he refers as settling this point, we find that the foundation upon which he predicts his statement is a mere rope of sand, and that the court in this case directly and positively decides that a private person cannot abate a public nuisance. He says that Lord HALE says, "any man may justify the removal of a common nuisance either by land or water, because every man is concerned in it." He then refers to *James v. Hayward*, Cro. Car. 184, which was a case where a new gate was erected across a highway, completely blocking travel over it. The defendant cut it down, and the court held that it was a nuisance, and that the defendant was justified in removing it, although the court were divided upon this question, and the act was only justified by a bare majority of the judges. *Lodie v. Arnold*, 2 Salk. 458, also referred to by him, was a case where the plaintiff had erected a house across the highway so as to entirely prevent travel over it, and the defendant tore it down, and in doing so the material fell into the sea. The court held that no action would lie for the damage. Hawkins' P. C., vol. 1, chap. 76, § 61, is also referred to as sustaining his position. The section referred to is as follows: "*In what manner all other annoyances obstructing the highway are to be removed, it seems clear that by the common law any one may abate a nui-*

sance to a highway, and to remove the materials, but not to convert them to his own use." And *Hart v. Mayor of Albany*, 9 Wend. 589, 671, which is also referred to, decided no such point. The statement in that case relied upon is a mere *dictum*, and was not accepted by the court, and the authorities referred to by Senator EDMUNDS in support of the position do not at all warrant the *dicta*.

These are all the authorities referred to by the court, from which the learned judge makes the sweeping assertion that "a common nuisance may be abated by any person." It will be seen that in every case referred to by the court, there was a total obstruction of the highway. In *James v. Hayward*, by a gate unlawfully continued. In *Lodie v. Arnold*, a house built across the highway, and in actions for damages against the persons who abated the obstructions, the court held that the persons making the removals were justified, because they were obstructions to public travel, and the private rights of the parties abating them.

The section quoted from Hawkins does not in any measure sustain the general position of the court, except in cases of actual obstruction to a highway, and then the assumption is, that the person who takes the pains to remove the nuisance is himself obstructed, and all these authorities relate entirely to nuisances existing in highways. But aside from this general error into which the court fell, and that without meaning to extend the application of the principle beyond the class of obstructions with which it was dealing, the court adopted the rule that in order to justify the defendant in his action in the premises, even though he was acting under the direction of the officers who, by law, had charge of the repairs of the highway, he must show that the obstruction was a nuisance, and that it actually obstructed the highway and rendered it less commodious for the purposes of travel. It can hardly be said that this case, or any of those referred to therein, furnish very good authority for the broad doctrine fraught with such dangerous consequences that a common nuisance may be abated by any person. And again, it will be observed that the judgment of the court was in direct conflict with this doctrine. For any obstruction of a highway or encroachment thereon, whether it amounts to an actual obstruction or not, is a public nu-

sance, and indictable as such, for the public is entitled to the whole highway in its whole length and breadth, and he who encroaches thereon encroaches upon a public right, and is guilty of a nuisance.¹ Therefore, if a public nuisance may be abated by any person, it was competent for the defendant to abate the nuisance, for the abatement of which the court says he had no justification or excuse. The truth is, the court said what it did not mean. It intended simply to express the general doctrine that any person who is injured by a public nuisance may abate it, and its decision is in consonance with this view, and cannot be upheld upon any other ground. It is true that the court labors to establish the doctrine that every encroachment upon a highway is not a nuisance, and that the question of nuisance or not is for the jury. But here the court falls into an error, for an encroachment upon a highway is *per se* a nuisance, and it is only when the question of reasonableness and necessity are raised that the jury is to determine whether the use is a nuisance. It could hardly be claimed that the erection of a wall in the limits of a highway is a necessary or reasonable use of the highway, and it was simply ridiculous for the court to leave the question to the jury, whether such a use of the road was a nuisance. When a man is indicted for erecting a nuisance upon the highway, by blocking or obstructing the same with his horses and carts, the question may fairly arise to be determined by the jury, whether the use was unreasonable and consequently a nuisance, for such an obstruction is only temporary, and arises out of the ordinary uses in which the road is used. But where a permanent erection is made within the limits of a highway, the question of reasonableness or necessity cannot arise, and there can be no justification or excuse for the same, consequently no question for the jury except to find the fact of encroachment. To illustrate the idea, the court notices the case of a highway running along the edge of a precipice, and says that it could hardly be claimed that a fence erected within the limits of a highway at such a point would be a nuisance. In such a case it would be the duty of the authorities to protect the public against the danger incident to such an exposure in a highway, and it may fairly be said that a road left unprotected at such

¹ State v. Atkinson, 28 Vt. 448.

a point by suitable guards, would be a nuisance itself, and indictable as such, and if the public failed to perform its duty to the public, it is possible that it would be no offense for an individual to perform it for them. It would be an act to prevent rather than create a nuisance, for the public safety requires the erection of some guard at such a point, and as that is the paramount law, it would seem that it would, although this is by no means certain, and upon the authority of some cases might be regarded as doubtful. The intent with which the act is done is not the question, and if the act is unlawful, it is no defense to say that the public good is thereby subserved. In *Rex v. Ward*, 4 Ad. & E. 384, it was held, in overruling the case of *Rex v. Russell*, that it is no defense to an indictment for an obstruction of a navigable river, that the obstruction is actually to the advantage of the public, and the same doctrine is held in *Regina v. Betts*, 16 Q. B. 1022, and in *Rex v. Watts*, Moody & M. 281. So in *Works v. Junction R. R. Co.*, 5 McLean, 425. So in *Respublica v. Caldwell*, 1 Dallas, 150, the court held that it was no defense to an indictment for an obstruction of a public navigable stream, that it was a public advantage. It instances the case of ornamental trees planted within the limits of a highway, and asks if they are necessarily nuisances? Strictly speaking, there can be no doubt but that a person may be indicted for setting them there, even though they are not an actual obstruction. Such, at least, was the case at common law, and by the statute of Westminster, chapter 5, it was provided that no shade or ornamental tree should be planted within two hundred feet of the center of a highway leading from one market town to another, and it was also made the duty of every land owner to keep the branches of his shade trees lopped so that they should not extend over the road and interrupt travel.

SEC. 737. No man has a right to abate a purely public nuisance. A purely public nuisance is one that affects public rights merely, and does not damage one individual member of the community more than another. Principal among such nuisances are those which merely affect the morals of the community, and arise from the improper, immoral, indecent and unlawful acts of

a person. Thus a liquor store where liquor is sold contrary to law, is a purely public nuisance, but no person would be justified in tearing down the store, or demolishing the furniture, fixtures or implements used therein, or destroying the liquor.¹

So a disorderly house is strictly and *per se* a public nuisance, but the only remedy by which to arrest its evil influences is by an appeal to the law.²

So a gaming house is a public nuisance, and all the implements used there, but however disastrous their effects may be to society, there is no legal method by which to suppress them, except by public prosecution. And this is the rule in reference to all merely public nuisances.

Again, when a person invades a public right, as by an erection in a navigable stream, or by placing any thing in a public highway, navigable stream, or on lands to which the State has a title, it is a public nuisance purely, unless it at the same time obstructs, hinders or invades unreasonably some private right, and no person can abate this nuisance of his own motion, unless it injures him by violating a clear and well-defined right. Thus in *Mayor of Co'chester v. Brooke*, 6 Q. B. 339, which was an action for injuring the plaintiff's oyster beds in the river Colne by improper navigation. The defendant plead that that part of the river was a public navigable river, and a public highway for all the King's subjects. It appeared that the defendant's vessel, in passing up the river at a place called the Hound, grounded on an oyster bed, claimed by the plaintiffs as their property, and did considerable damage. The tide was in the "dead o' the neaps" (being a condition of the tide incident half way between the new and old of the moon) and as the vessel would be unable to pass for two days, the crew left her and went ashore. The vessel being improperly anchored, shifted her position when the tide rose and grounded in another place and did new damage to the oyster bed. The jury found, under the direction of the court, that there was no negligence in the first instance, but that there was great negligence in the second. And the court of queen's

¹ *Blodgett v. Syracuse*, 36 Barb. (N. Y.) 529; *Brown v. Perkins*, 12 Gray (Mass.), 89; *Ely v. Supervisors*, 36 N. Y. 297; *Moody v. Supervisors*, 46 Barb.

(N. Y. S. C.) 659; *Grey v. Ayres*, 7 Dana (Ky.), 375; *Shaubut v. St. Paul R. R. Co.*, 21 Minn. 502.

² *Ely v. Supervisors*, 36 N. Y. 237; *Welch v. Stowell*, 2 Doug. (Mich.) 125.

bench held that the defendants were liable for the damage, although the oysters were placed in the channel of a public navigable river so as to create a public nuisance. The court said, that a person navigating a river was not justified in damaging such property by running his vessel against it if he had room to pass without doing so, for an individual may not abate a public nuisance if he is in no otherwise injured by it than as one of the public. Lord DENMAN, Ch. J., said: "However wrongful the act of the plaintiff may have been, yet as the defendant sustained no special inconvenience therefrom, he certainly could not be justified in willfully infringing upon the beds and destroying the oysters even for the purpose of abating a public nuisance," and he further adds: "It is very important for the sake of the public peace and to prevent oppression, even on wrong-doers, not to confound common with private nuisances in this respect. In the case of private nuisances, the individual aggrieved may abate it, (3 Bl. Com. 5) so as he commits no riot in doing it, and a public nuisance becomes a private one to him who is specially and in some particular way inconvenienced thereby, as in the case of a gate across a highway which prevents a traveler from passing and which he may therefore throw down; but the ordinary remedy for a purely public nuisance is by indictment, and each individual, who is only injured as one of the public, can no more proceed to abate than he can bring an action."

In a more recent case, that of *Dimes v. Petley*, 15 Q. B. 276, Lord CAMPBELL, Ch. J., says: "It is fully settled by the recent cases that if there be a nuisance in a public highway, a private individual cannot, of his own authority, abate it, unless it does him a special injury, and then only to the extent necessary to enable him to exercise his right of passing over the highway. And we clearly think he cannot justify doing any damage to the property of individuals who have improperly placed the nuisance there if avoiding it he could have passed on with reasonable convenience."

In a recent case in Pennsylvania (*Cobb v. Bennett*, 75 Penn. St. 326), the defendant, who was the owner of a boat navigating a stream, ran into a net set in a private fishery. The court held that, if the captain by reasonable care could have avoided the

net, he was bound to do so, and that, while it was true that the rights of navigation are superior to the rights of fishery, yet, if the nets did not operate as an obstruction to the vessel, the defendant was not justified in destroying or injuring it.

The general understanding as to the law in this respect in England in early times, may probably be better gathered from Blackstone's Commentaries than from any other source. In volume 3, page 5, he says: "If a new gate be erected across a highway which is a common nuisance, any of the king's subjects *passing that way* may cut it down and destroy it." On page 6, in speaking of the redress of private wrongs by the act of parties, he says: "Such nuisances may be abated, that is, taken away or removed by the act of the party aggrieved thereby, so as he commits no riot in doing it." And he proceeds to illustrate the text by giving instances in which this summary method may be resorted to as well as the reason therefor. He instances the case of a house which stops up ancient lights; a new gate placed across the highway, and he says the reason why the law allows this private and summary method of doing one's self justice, is because injuries of that kind which obstruct and annoy, such things as are of daily occurrence and use, require an immediate remedy and cannot wait for the slow progress of the ordinary forms of justice." In volume 2, page 360, of Lily's Register, published in 1720, the learned author says: "Nuisances are either public or private. Public is where any thing is erected in the king's highway, which any man may remove or the party may be indicted for it. But private nuisance is where any man stoppeth his neighbor's lights, or annoys him in any other manner. An action on the case or an assize of nuisance lies against the *tortfeasor*. A common nuisance may be abated or removed by those persons who are prejudiced by it. Pasch. 23, Car. B. R., and they are not compelled to bring actions to remove them." Here then we find that as early as 1719 (when this work was written), it was understood as the law in England that a common nuisance could be abated, not by any person, but only by a person who was prejudiced by it, and also that in order to warrant a person in removing such a nuisance he must be prejudiced by it.

In Broom's Commentaries on the Common Law (4th ed., p. 222), the learned author says: "In regard to the abating of a public nuisance it is laid down that if a new gate be erected across a public highway which is a common nuisance, any of the king's subjects *passing that way* may remove it. But the cases show that to justify a private individual in abating on his own authority such a nuisance, it must appear that it does him a special injury, and he can only interfere with it as far as may be necessary to exercise his right of passing along the highway with reasonable convenience, and not because the obstruction happens to be there."¹

That the courts never intended to give any unwarranted latitude to individuals, by which this method of summary justice could be construed into a license to any person, whether from motives of malice or a spirit of mischief, to prey upon the property of another who was a wrong-doer even, but intended to restrict its exercise to cases of actual infringement of rights, and then only to the extent necessary to secure a reasonable exercise of the right, is evident from all the early cases that are intelligibly reported. Thus in *Cooper v. Marshall*, 1 Burr. 260, it was expressly held that a man had no right to abate any more of a nuisance than was necessary to secure his right, because when that was done the thing as to him ceased to be a nuisance.

In *Rex v. Pappineau*, 1 Strange, 688, Lord RAYMOND says, "that if any neighbor builds his house too high, by which any ancient lights are stopped, I shall not take down the whole house, but only so much as makes it too high." Here we have the whole law upon this subject in a nut-shell. No person shall abate any more of a nuisance than is necessary to secure his rights, for when that is done the thing as to him ceases to be a nuisance. The fact that the public may have further redress by way of indictment or otherwise is no concern of his.

The law will protect the rights of the public, and furnish adequate remedies for the redress of all its grievances.

¹ *Dimes v. Petley*, 15 Q. B. 276; *Wales v. Stetson*, 2 Mass. 143; *Hopkins v. Grand Junction Railroad Co.*, 3 Mees. & W. 244; *Roberts v. Rose*, 1 Exch. 82; *Bateman v. Bluck*, 18 Q. B. 870; *Mayor of Colchester v. Brooke*, 7 id. 339; *Hubbard v. Deming*, 21 Conn. 356; *Moffat v. Brewer*, 1 Iowa, 348; *Kins v. Crombie*, 4 N. H. 520; *Gates v. Blance*, 2 Dana (Ky.), 158; *Rung v. Shonenberger*, 2 Watts. 23; *Arundel v. McCulloch*, 10 Mass. 70; *Rogers v. Rogers*, 14 Wend. 250.

In the case of *Harrower v. Ritson*, 36 Barb. (N. Y. S. C.) 201, which was an action of trespass for removing a fence which had been built by the plaintiff within the actual limits of a highway ; although as to whether it was so built as to operate as an obstruction to public travel does not appear. The judge on the trial at the circuit was requested to charge the jury, 1st. "That a mere encroachment on the road by the fence did not authorize the removal of the fence by the defendants, unless it hindered, impeded or obstructed the use of the road by the public." The judge refused to charge as requested, and a verdict being rendered for the defendants, the case was taken to the Supreme Court where ALLEN, J., delivered an able and exhaustive opinion, in which he conclusively establishes the doctrine that a private party cannot lawfully abate a public nuisance, unless it operates as a special injury to him, and then not to a greater extent than is necessary to secure the reasonable exercise of his right. The same question was subsequently raised in *Griffith v. McCullum*, 46 Barb. (N. Y. S. C.) 561, which was an action for taking down a fence. The defendant in this case justified upon the ground that the fence was in the highway, and that he, being the sole road commissioner of the town of Pike, in which the trespass was committed, caused the fence to be removed. The judge at the circuit charged the jury that if the fence was within the limits of the highway, the defendant was justified in removing it, if in so doing he did no unnecessary damage. Also, that if the fence was any part of the highway, *any* one had a right to remove it, whether it was any annoyance, inconvenience or interruption to travel or not. The case went to the Supreme Court on exceptions, and MARVIN, J., delivered the judgment of the court in a masterly opinion, in which he entered into a thorough review of the cases both in this country and England, and sustained the doctrine of the court as laid down in *Harrower v. Ritson*, *ante*, to its fullest extent. After an exhaustive examination of the case, he sums up the doctrine of the court as follows :

‘Having ascertained what constitutes a nuisance, public or private, and also having considered the remedies, it seems clear to my mind,

“1st. That every encroachment to a highway is not a nuisance.

"2d. That that which is exclusively a common or public nuisance cannot lawfully be abated by the private acts of individuals. The remedy is an indictment—a criminal prosecution, unless the statute has provided some other remedy.

"3d. A private nuisance may be abated by the party aggrieved.

"4th. A nuisance may be both public and private. In such a case the public may proceed by indictment to abate it and punish its authors, or those individuals to whom it is a private nuisance, by means of its being especially inconvenient and annoying to them, or that they are in some particular way incommoded thereby, may of their own act abate it." Then he proceeds to state, "as the learned judge held in this case (at the circuit) that every encroachment upon a highway is a nuisance, in my judgment he erred. If the evidence had tended to prove facts which constitute a nuisance, and the question of nuisance was material in the case, it should have been submitted to the jury, unless the encroachment was such as to constitute a private as well as public nuisance, the defendants were not justified in removing the fence. It would be an alarming doctrine that all persons who are by their fences encroaching upon the highway, are liable to have their fences thrown down at any time by commissioners of highways or other persons. I have endeavored to show that there is no authority for this common law. The remedy on the part of commissioners is by statutes, which are quite ample to protect the public."

I have referred to these cases relating to nuisances upon highways, to illustrate the general doctrine of the courts relative to the rights of individuals upon their own motion to abate a public nuisance, because in cases of this character, they have given a wider latitude to individual action than in any other, and because such cases embrace the doctrine in its broadest and most extreme sense. And it is certain, that if no person who is not specially injured by an obstruction in a public highway may remove it, then no person who is not specially and materially injured by any other public nuisance, such as arises from the use to which property is devoted, producing noxious smells, vapors, and other ill-effects, rendering the enjoyment of property in their neighbor-

hood uncomfortable, can abate it. Such a power placed in the hands of any person who saw fit to exercise it, would be destructive of the best interests of society, and would lay open a large part of our manufacturing and business interests, to the mere caprice of the reckless and unprincipled elements that form a part of every community, and instead of making the law a shield against wrong and oppression, would convert it into a sword with which to strike down any interest that chanced to fall under the ban of any person's displeasure. The right to abate a private or public nuisance rests upon the same ground. A private nuisance injuring a private right may be abated by the person injured to the extent necessary to secure a reasonable enjoyment of the right injured. Any excess of abatement becomes a trespass *pro tanto*. Every man is his own judge, and he judges at his peril. In the case of a public nuisance, which also affects individual rights, and which for convenience sake are designated as mixed nuisances, the person whose rights are invaded, and who suffers a special damage therefrom, may abate the nuisance to the same extent, and subject to the same limitations as apply to the abatement of a private nuisance. But a person who sustains a special damage therefrom, other than as one of the public, cannot lawfully interfere to remove the nuisance. Individual inquiries then become merged in the public offense, and can only be redressed by a public prosecution through its proper officers.

In the case of *Brown v. Perkins*, 12 Gray (Mass.), 89, the defendant with others entered the store of the plaintiff, who was a liquor dealer, and destroyed his liquors, claiming that they were a public nuisance, and open to destruction by any person, but particularly by those whose husbands and fathers and sons obtained liquors there with which they became intoxicated, and as a consequence of which the persons abating the nuisance were injured. But the court held that, even if the keeping of a liquor store and the selling of liquors to the persons referred to, did constitute a public nuisance, that it was a purely public nuisance, and one which could not be abated by the act of private persons. That the right of a private person to abate a public nuisance is confined to the removal of physical nuisances, which obstruct the exercise of some of their own rights, or which endanger their

peace, happiness, health or lives to such an extent that they cannot wait for the intervention of the law. But that under no circumstances can they interfere to abate an intangible nuisance, whose effect is merely moral, and results from the improper use to which the property is put by its owner. In the case last cited, the learned judge advanced the doctrine that no person could abate a public nuisance, except where he could maintain an action for special damages. And this would seem to be the rule suggested by sound public policy, and as the rule is so extended that a person may recover for a slight hindrance of his rights, it can operate no hardships to any person, while it certainly tends to sustain the public peace. For if a man passing along a highway finds a fence across it, barring his progress, he may certainly take it down, and the court say, that, although the labor is small and the trouble slight he shall have his action for the injury.¹ It seems to me that the rule is generally adopted both in England and by most of the courts in this country, that any person who is hindered of his right by a public nuisance, may remove so much of it as is necessary to secure his right, is the best rule.

In a recent case in Rhode Island the court put the right of private parties to abate a public nuisance upon the broad ground that there must be such an injury to the individual rights of the party removing it as will enable him to maintain an action therefor, and that even *then* he must abate no more of the nuisance than is necessary to secure the exercise of his right. For any excess in that respect he is liable to respond in damages.²

This is virtually placing the right of abatement upon the same grounds as that of the right of self-defense. Any person who is assaulted by another may use so much force as is necessary to repel the assault and protect his person from injury. If he is guilty of any excess of force in this respect, he is held chargeable for the excess, both civilly and criminally, and surely a man's personal safety is of higher consequence to him than any rights of property, or than his mere personal convenience, and if he is held up to this strict accountability for an error of judgment, at

¹ *Pierce v. Dart*, 7 Cow. (N. Y.) 609; *Brown v. Watrous*, 47 Me. 161; *Powers v. Irish*, 27 Mich. 429. ² *State v. Keenan*, 2 Ames (R. I.), 497.

a time when the judgment is necessarily more or less warped by passion or excitement, naturally incident to an unwarrantable attack upon his person, it cannot be said to be unjust to hold him to a strict accountability in the enforcement of a mere right of property or personal right, when he has ample time for the exercise of judgment and discretion, and the procuring of counsel even, as to what he should do and how far he can go. This is really the rule as adopted and laid down in the best considered cases, and it is the true rule and one that is eminently just. A person may abate so much of a nuisance, private or public, as is necessary to secure his right, but if he is guilty of any excess he is liable therefor *pro tanto*. Every man proceeds to abate any nuisance at his peril. He judges for himself, and if he misjudges he is answerable for all the consequences. Therefore, except in extraordinary cases, where delay will be attended with such serious consequences that it cannot reasonably be adopted, it will usually be the wisest course in the case of purely private nuisances, or public nuisances, where the abatement may result in involving the person in damages, to appeal to, and take the redress that the law affords, which is always ample, reliable and safe.¹

CHAPTER TWENTY-SECOND.

MUNICIPAL CORPORATIONS.

SEC. 738. Municipal corporation, its source of power.

739. No control over nuisances without special power.

740. Legislature may confer power.

741. Ordinances must not be arbitrary.

742. Cannot license nuisances.

743. Liable for nuisances permitted or created by it.

744. Liability for not removing.

¹ Hicks v. Dorn, 42 N. Y. 47; Vason v. S. C. R. R. Co., 42 Ga. 631; Clark v. Ice Co., 24 Mich. 508; McGregor v. Boyle, 34 Iowa, 288; Manhattan Manufacturing Co. v. Van Keuren, 23 N. J. 251; Thompson v. Allen, 7 Lans. (N.

Y.) 459; Brown v. Perkins, 12 Gray, 89; Welch v. Stowell, 2 Doug. (Mich.) 329; Miller v. Birch, 32 Texas, 208; 5 Am. Rep. 242; Dimes v. Petley, 15 Q. B. 277; Brightman v. Bristol, 65 Me. 426.

SEC. 738. A municipal corporation derives all its powers from the legislature. It may do any act which it is authorized to do by that body, within the constitutional exercise of its powers, and all acts that are fairly and legitimately incident to the powers granted, but it cannot lawfully go beyond that point.¹ It takes nothing by implication, except such powers as are fairly and legitimately within the letter and spirit of the grant.² The fact that the public good, or the welfare of the corporation requires that certain acts should be done, does not warrant their being done, unless they come within the scope of the powers delegated.³ The charter, and special acts in addition thereto, if there be any, are the measure of its power, and, when it exceeds those powers, its acts are unlawful, unwarranted, and afford no protection whatever to those acting under them.⁴

¹ In *Berlin v. Gorham*, 34 N. H. 266, it was held that municipal corporations are completely constituted by the mere passage of an act of incorporation by the legislature, and that they thereby became entitled to the rights, and subject to the liabilities thereof, whether its inhabitants were pleased or displeased therewith. That they were the creations of legislative power, and that the legislature was not bound to consult the wishes of the people in reference to their creation. But an act of incorporation may be made conditional upon its acceptance by the corporators. *City of Paterson v. Society, etc.*, 4 Zabriskie (N. J.), 385. In *Gorham v. Springfield*, 21 Me. 58, it was held that such corporations exist at the pleasure of the State, and not at their own.

² All the powers not expressly granted by the charter, or necessary to carry out its powers, are treated as denied. The corporation takes nothing by implication. *Leavenworth v. Norton*, 1 Kansas, 432; *Webster v. Harwinton*, 32 Conn. 131; *Alley v. Edgecomb*, 53 Me. 446; *Hooper v. Emery*, 14 id. 375; *Kyle v. Malin*, 8 Ind. 34; *Ex parte Burnett*, 30 Ala. (N. S.) 431; *Kirk v. Norville*, 1 T. R. 124.

³ *Overick v. Pittsburgh*, 7 Am. Law Reg. (N. S.) 725; *Gale v. So. Berwick*, 51 Me. 174; *Booth v. Woodbury*, 32 Conn. 118; *Barton v. New Orleans*, 16 La. Ann. 317; *Hasbrouck v. Milwaukee*, 13 Wis. 37; *C. R. I. & P. R. Co. v. St. Josephs*, 79 Ill. 44.

⁴ *Clark v. Syracuse*, 13 Barb. (N. Y.) 32. In *Kirk v. Norville*, 1 T. R. 124, the court, in discussing the powers of a municipal corporation, and of those acting under its authority, lays down what appears to be the true rule: "A corporation," says Lord MANSFIELD, in the definition of it, "is a creature of the crown, created by letters patent, and a corporation with the power of making by-laws, cannot make any such law to incur a forfeiture. Those corporations which are created by act of Parliament have no other additional powers incident to them unless they are expressly given. No such power of making by-laws to incur a forfeiture appearing upon the plea to have been conferred, it is impossible for the court to say that this by-law can be supported by the act." And in this case, the defendant, who was sued in trespass for executing the provisions of the by-law, was held chargeable for the damages.

In *Miller v. Burch*, 32 Texas, 208; 5 Am. Rep. 242, the defendant purchased a livery stable belonging to and upon the premises of the plaintiff, under a sale by the authorities of the town of Bastrop, who sold it under the provisions of an ordinance of the town council, declaring it a nuisance, and ordering its sale and removal. The defendant purchased the building and tore it down, and removed the materials. In an action of trespass therefor, the defendant justified under the ordi-

SEC. 739. Therefore, a municipal corporation has no control over nuisances existing within its corporate limits except such as is conferred upon it by its charter or by general law. There can be no question, however, but that where a nuisance exists within its corporate limits that is clearly a nuisance at common law or by statute, that is detrimental to the health of the inhabitants, it may be abated by the authorities, but it must be a nuisance at common law and one which any person injured thereby might lawfully abate of his own motion, or, in the absence of express or implied authority given, the removal or abatement of the nuisance would be unlawful. Where the thing abated is clearly a nuisance, and one which affects the *health* of the city, the abatement may be made by the authorities or by any person injured thereby. The common law, in such a case comes in aid of the authorities, and they are justified in the act, not because they are officials of the city, *but because they are citizens injured by the thing abated.*¹

nance, but CALDWELL, J., in delivering the opinion of the court, said: "The question is well settled that a corporation can exercise no power not clearly delegated in the act of incorporation, or arising by necessary implication out of the power delegated. An ordinance not warranted by the charter is void, and can furnish no justification to a person acting under it." Also see *Welch v. Stowell*, 2 Doug. (Mich.) 322; *Sedgwick on Stat. and Const. Law*, 464; *State v. Street Commissioners*, 36 N. J. L. 383.

¹ In *Meeker v. Van Rensselaer*, 15 Wend. (N. Y.) 397, the defendant during the prevalence of the Asiatic cholera, under an ordinance of the city of Albany, tore down a tenement house in the ward in which he resided that belonged to the plaintiff, which was filled with families of poor people who allowed the house to remain in a filthy condition, which endangered the health of the city, and who neglected to clean the house or to remove therefrom, after notice to do so. The court, in passing upon the question of the defendant's liability, held that he was justified in his acts by the extraordinary emergency, but not as an official of the city, *but as a citizen of the city interested in the maintenance of its*

health, particularly in the ward in which he resided. See also *Van Wormer v. Albany*, 15 Wend. (N. Y.) 262. In *Manhattan Co. v. Van Keuren*, 23 N. J. 255, the defendant, under directions from the city government, destroyed a portion of the machinery in the poudrette works of the plaintiffs, which, by reason of the noxious and offensive stenches arising therefrom, seriously affected the health of the residents of the city. The court held that the defendant was justified in his acts, because, as a citizen of the city, he was interested in its health and was affected by the nuisance. The court placed the right upon the ground that public safety is the paramount law. DOWD, J., said: "Any citizen acting as an individual or as a public official under the orders of local or municipal authorities, whether such orders be or be not in pursuance of special legislation or chartered provisions, may abate what the common law declares a public nuisance." Thus it will be seen that unless express authority is given by law, the control of a municipal corporation over nuisances is no greater, no more nor less than that possessed by individuals in their individual and private capacity. They can only abate such nuisances as

SEC. 740. But where the legislature confers upon a city or village the power to regulate and remove nuisances and to provide penalties therefor, or to remove such as are detrimental to the health of the inhabitants, this power confers authority upon the city government to impose penalties upon persons maintaining nuisances within its jurisdiction, and to remove the same, provided the thing be a nuisance at common law or by statute, and produces such an injury that an individual injured thereby might remove it, but not otherwise,¹ and if the authorities abate a nuisance under authority of an ordinance of the city, they are subject to the same perils and liabilities as an individual if the thing abated is not *in fact* a nuisance.² But, where the corporation is clothed with power by its charter, or special or general law to abate or remove nuisances, that does not confer authority to *prevent* them, nor to impose penalties for their erection. Neither does authority to prevent nuisances confer authority to abate them. Neither does the power to abate nuisances warrant the destruction of valuable property which was lawfully erected,³ or any thing which was erected by lawful authority.⁴ It would, indeed, be a dangerous power to repose in municipal corporations to permit them to declare, by ordinance or otherwise, any thing

are injurious to the health of the city, and such as are clearly nuisances at common law, *and such as affect them as citizens injuriously*. The language of DOWD, J., may bear a more extended application, but so far as it exceeds the rule above given, it is clearly contrary to authority, and not sustained upon principle, and I do not think that the court intended to lay down the broad doctrine that any person may abate a public nuisance. He says that *any citizen* may abate it, clearly intending by the use of the word *citizen*, to restrict the exercise of such dangerous powers to those who were immediately affected by the nuisance. In *Pieri v. Shieldsboro*, 42 Miss. 393, it was held that a city cannot, by an arbitrary ordinance, declare property a nuisance and destroy it, unless such property is shown to be *in fact* a nuisance. A board of health held to have power to fence a lot to remove the cause of a nuisance. *Wistar v. Adicks*, Phila. (Penn.) 145.

¹ *Savannah v. Hussey*, 21 Ga. 80; *Ashbrook v. Com.* 1 Bush. (Ky.) 139; *Harrison v. Baltimore*, 1 Gill. (Md.)

264; *Yates v. Milwaukee*, 10 Wall. (U. S.) 497; *Clark v. Mayor*, 13 Barb. (N.Y.) 32; *Welch v. Stowell*, 2 Doug. (Mich.) 323; *Underwood v. Green*, 43 N. Y. 140; *Gregory v. Railroad Co.*, 40 id. 273; *Buffalo Iron Works v. Buffalo*, 13 Abb. Pr. (N. Y., N. S.) 141; *Harper v. Milwaukee*, 30 Wis. 365; *Haskell v. New Bedford*, 108 Mass. 208; *Shaw v. Crocker*, 42 Cal. 435.

² *Clark v. Mayor*, ante; *Welch v. Stowell*, id.; *Kennedy v. Phelps*, 10 La. An. 227; *Green v. Savannah*, 6 Ga. 1; *Green v. Underwood*, ante; *Kennedy v. Board of Health*, 2 Penn. St. 366; *Milne v. Davidson*, 5 Mart. (La.) 586; *Com'rs v. Van Sickle*, Bright (Penn.) 69; *Bourne v. Utica*, 2 Barb. (N. Y.) 104; *Church v. Milwaukee*, 31 Wis. 512; *Blount v. Janesville*, id. 648; *Stowell v. Milwaukee*, id. 523; *Ullison v. Cincinnati*, 2 Cin. (O.) 462.

³ *Clarke v. Mayor*, 13 Barb. (N. Y.) 32.

⁴ *People v. Albany*, 11 Wend. (N. Y.) 539.

a nuisance, which the caprice or interests of those having control of its government might see fit to outlaw, without being responsible for all the consequences, and, even if such power is expressly given by the legislature, it is utterly inoperative and void, unless the thing is in fact a nuisance, or was created or erected after the passage of the ordinance, and in defiance of it.¹

The fact that a particular use of property is declared a nuisance by an ordinance of the city does not make that use of property a nuisance, unless it is *in fact* so, and comes within the common law, or statutory idea of a nuisance.² Hence, authority conferred by an ordinance of the city is no protection against liability for damages resulting from the destruction of property upon the grounds that it is a nuisance, unless its unlawful character is clearly established.³ Therefore, except in cases of great public emergency, when the emergency may safely be regarded as so strong as to justify extraordinary measures upon the ground of paramount necessity, or when the use of property complained of is so clearly a nuisance as to leave no room for doubt upon the subject, it is the better course to secure an adjudication from the courts, before proceeding to abate it.⁴

SEC. 741. But there is no question but that, when a municipal corporation has been authorized by its charter to pass ordinances to remove and prevent nuisances, it may, for the preservation of public health, safety and convenience, provide the manner in which property within its limits shall be used, and prevent a different use of it, by fine and force if necessary. But such ordinances must not be arbitrary or unreasonable, and must

¹ Mayor of Hudson v. Thorne, 7 49 Ill. 172; Babcock v. City of Buffalo, 56 N. Y. 268.

² The act or thing complained of must come within the legal notion of a nuisance, Crosby v. Warren, 1 Rich. (S. C.) 385, and where it does not, no authority to remove it is derived from the ordinance declaring it such, Salem v. R. R. Co., 98 Mass. 431; Wrexford v. People, 14 Mich. 41; New Orleans v. St. Louis Church, 11 La. Ann. 244; State v. Jersey City, 5 Dutcher (N. J.), 170; Clark v. Mayor of Syracuse, 13 Barb. (N. Y.) 32; Yates v. Milwaukie, 10 Wall. (U. S.) 497; Chicago v. Saffein,

³ Clark v. Syracuse, ante. In Yates v. Milwaukie, 10 Wall. (U. S.) 497, the court held that the mere declaration of a city ordinance, that a certain structure is a nuisance, does not make it so, unless it is *in fact* a nuisance. Welch v. Stowell, 2 Douglass (Mich.), 263.

⁴ Underwood v. Green, 42 N. Y. 140; Clark v. Syracuse, 13 Barb. (N. Y.) 32; Kennedy v. Board of Health, 2 Penn. St. 386. And the abatement must not exceed the necessity. Babcock v. Buffalo, 56 N. Y. 268.

clearly be for the preservation of the public health, safety or convenience.¹

Thus there can be no doubt that the city may lawfully cause the removal of any obstruction in a public street,² or encroachment upon it,³ or over⁴ or under it,⁵ which in any measure inter-

¹ *Dubuque v. Malony*, 9 Iowa, 450; *Com. v. Worcester*, 3 Pick. (Mass.) 462; *Washington v. Nashville*, Swan (Tenn.), 177. It may regulate the passage of animals through the streets, *Com. v. Curtis*, 9 Allen (Mass.), 266; *Roberts v. Ogle*, 30 Ill. 459; *Com. v. Bean*, 14 Gray (Mass.), 52; *Commissioners v. Gas Co.*, 12 Penn. St. 318. Must be reasonable; see also *Mayor of Hudson v. Thorne*, 7 Paige (N. Y.), 261. It must not operate as an unreasonable restraint of trade, *St. Paul v. Laidler*, 2 Minn. 190; *Rex v. Company*, 7 D. & E. 543; *London v. Compton*, 7 Dowl. & R. 597. Nor oppressively to the people, *Memphis v. Winfield*, 8 Hump. (Tenn.) 707, in which an ordinance directing the arrest of all free negroes found in the streets after ten o'clock at night was held void, as being oppressive. Neither must it be of a character that is exclusive, *Hayden v. Noyes*, 5 Conn. 391. But the fact that it is made with special reference to a particular person does not affect its validity, if it is general in its operation, *Com. v. Goodrich*, 13 Allen (Mass.), 545; *Baker v. Boston*, 17 Pick. (Mass.) 184; *White v. Mayor*, 2 Swan (Tenn.), 364; *Bloomington v. Wahl*, 46 Ill. 489; *People v. Albany*, 11 Wend. (N. Y.) 539; slight irregularities will not invalidate it, *Chicago v. Rumpf*, 45 Ill. 80. It may prohibit the removal of dirt or offal by any one, except those having licenses from the city, *Vandine's case*, 6 Pick. (Mass.) 187. It may require all hoistways to be inclosed by a railing, *New York v. Williams*, 15 N. Y. 502; may prevent the raising of rice upon land within its limits, *St. Paul v. Cloutier*, 12 Minn. 41; *Peoria v. Calhoun*, 37 Ill. 217. They must be consistent with the common law, and the general laws of the State. If they conflict with the common law, statute, or the fundamental law, they are void, *Williams v. Augusta*, 4 Ga. 509; *St. Louis v. Benton*, 11 Mo. 61; *Cowen v. West Troy*, 43 Barb. (N. Y.) 48; Col-

lins v. Hatch, 18 Ohio, 423; *New York v. Nichols*, 4 Hill. (N. Y.) 409; *New Orleans v. Philpi*, 9 La. Ann. 44; *Peterfield v. Vickers*, 3 Calder (Tenn.), 205; *City Council v. Goldsmith*, 2 Spen. (S. C.) 435. May prohibit swine from running at large, *Com. v. Bean*, 14 Gray (Mass.), 52. But ordinances are void if they contravene a common right, *Taylor v. Griswold*, 2 Green (N. J.), 222; *Peck v. Lockwood*, 5 Day (Conn.), 22. But they may regulate the exercise of a common right, provided the regulation is not unreasonable, *Com. v. Patch*, 97 Mass. 221; *Vintners v. Parrey*, 1 Burrows, 239; *Com. v. Robertson*, 5 Cush. (Mass.) 438, and the question of reasonableness is for the court and not for the jury, *Bacon's Abr.*, tit. By-laws; *Boston v. Shaw*, 1 Met. (Mass.) 130; *Com. v. Stodder*, 2 Cush. (Mass.) 562. By-laws must not be opposed to the spirit of the common or statute law, *Marietta v. Fearing*, 4 Ohio, 427; *Canton v. Nist*, 9 Ohio St. 437. Ordinances cannot provide for the forfeiture of property without express authority, *Kirk v. Nowill*, 1 T. R. 118; *Taylor v. Corandalet*, 22 Mo. 105; *Heise v. Town Council*, 6 Rich. (S. C.) 404; *Rosebaugh v. Saffin*, 10 Ohio, 32; *Lanfeur v. Mayor*, 4 La. 97; *Hart v. Mayor*, etc., 9 Wend. (N. Y.) 571; *Phillips v. Allen*, 4 Penn. St. 481; *Mayor v. Ordenan*, 12 Johns. (N. Y.) 122; *Dunham v. Rochester*, 5 Cowen (N. Y.) 46; *Mobile v. Yvielle*, 3 Ala. 137; *Bergen v. Clarkson*, 1 Halst. (N. J.) 352; but see *Roberts v. Ogle*, 30 Ill. 459.

² *Baker v. Boston*, 12 Pick. (Mass.) 184; *Com. v. Stodder*, 2 Cush. (Mass.) 562; *Jackson v. People*, 9 Mich. 111.

³ *Randall v. Van Vechten*, 19 Johns. (N. Y.) 96; *Noyes v. Ward*, 19 Conn. 250; *Hawley v. Harrall*, id. 142; *R. R. Co. v. Chenan*, 43 Ill. 209; *Philadelphia v. R. R. Co.*, 58 Penn. St. 253; *Com. v. Brooks*, 99 Mass. 434.

⁴ *Milhau v. Sharpe*, 18 Barb. (N. Y.) 175.

⁵ *Irvine v. Fowler*, 5 Rob. (N. Y.) 482.

feres with the safety or convenience of the public in the use of the street. It may by ordinance prohibit the erection or maintenance of awnings without a license from it, and except it is maintained as prescribed by it.¹ It may provide that buildings shall not be erected of wood or other inflammable materials.² It may prohibit the exercise of trades that endanger the lives or property of its citizens.³ It may prohibit the maintenance of unsafe structures on public streets.⁴ It may prevent the erection of signs over streets except under special regulations.⁵ It may prohibit the maintenance of coal holes, areas,⁶ or excavations of any kind in or along its street.⁷ It may prevent the setting of posts in the streets,⁸ the erection of stoops, porches, stairs or steps, bow-windows or buildings in or over the street.⁹ It may prevent excavations in or under the streets.¹⁰ So, too, it may prevent the exercise of noxious trades in public places,¹¹ and, when authorized to regulate wharves and piers and prevent obstructions to navigation, may provide how wharves and piers shall be erected, and may establish dock lines,¹² and may remove all actual obstructions to navigation within the limits of its jurisdiction.¹³ It may prohibit the occupation of the streets for market purposes,¹⁴

¹ *Patrick v. Bailey*, 12 Gray (Mass.), 161.

² *Hudson v. Thorne*, 7 Paige (N. Y.), 261; *Douglas v. Com.*, 2 Rawle (Penn.), 262; *Brady v. Ins. Co.*, 11 Mich. 425.

³ *Dubois v. Augusta*, Dudley (Ga.), 30; *Williams v. Augusta*, 4 Ga. 509.

⁴ *Harvey v. Dewoody*, 18 Ark. 252.

⁵ *Hewinson v. New Haven*, 36 Conn. 136; *Jones v. Boston*, 104 Mass. 75.

⁶ *Congreve v. Morgan*, 18 N. Y. 84.

⁷ *Nelson v. Godfrey*, 12 Ill. 22; *Cobb v. Standish*, 14 Me. 198.

⁸ *Com. v. Boston*, 97 Mass. 555; *Regina v. Telegraph Co.*, 9 Cox's Cr. Ca. 174.

⁹ *People v. Carpenter*, 2 Doug. (Mich.) 273; *Hall v. McCaughey*, 51 Penn. St. 43; *Stetson v. Faxon*, 19 Pick. (Mass.) 147; *State v. Mobile*, 5 Port (Ala.) 279; *Flemingsburgh v. Wilson*, 1 Bush (Ky.), 203; *Com. v. Blaisdell*, ; *Com. v. Rush*, 14 Penn. St. 186; *Attorney-General v. Heishon*, 18 N. J. 410; *Ketchum v. Buffalo*, 14 N. Y. 374; *State v. R. R. Co.*, 3 Zab. (N. J.) 360.

¹⁰ *Runyon v. Bordine*, 2 Greens (N.

J.), 472; *Scammon v. Chicago*, 25 Ill. 424.

¹¹ *Metropolitan Board of Health*, 37 N. Y. 661; *Wrexford v. People*, 14 Mich. 41; *Shrader, Ex parte*, 33 Cal. 279; *Gregory v. R. R. Co.*, 40 N. Y. 273; *Dubois v. Augusta*, Dudley (Ga.) 30.

¹² *Mayor v. Ryan*, 26 E. D. Smith (N. Y.), 368; *Yates v. Milwaukie*, 12 Wis. 673; but if vested rights are thereby affected, compensation must be made for injuries. *Culbertson v. The Southern Belle*, 1 Newb. Adm. 461; *Kenny v. New Orleans*, 15 La. 657.

¹³ *Hart v. Mayor, etc.*, 9 Wend (N. Y.) 571; *People v. Albany*, 11 id. 539.

¹⁴ *Com. v. Rice*, 9 Met. (Mass.) 253; *Shelton v. Mobile*, 30 Ala. 540; *Winsboro v. Smart*, 11 Rich. (Sc.) 551; *Dunham v. Rochester*, 5 Cow. (N. Y.) 462; *Le Claire v. Davenport*, 13 Iowa, 210; *Ash v. People*, 11 Mich. 347; *Nightingale v. Petitioner, etc.*, 11 Pick. (Mass.) 168; *Wortman v. Philadelphia*, 33 Penn. St. 202; *Rochester v. Pottinger*, 17 Wend. (N. Y.) 265.

may prevent the erection of private hospitals,¹ may prohibit exhibitions of an immoral or indecent character,² or the exercise of vocations of an evil tendency,³ and, generally, may provide in a reasonable manner, for the proper preservation of the health, safety and convenience of its citizens. But it must do this in a reasonable manner, and not arbitrarily, unreasonably, or in a manner that bears the evident taint of tyranny or oppression.⁴ Its ordinances cannot have a retrospective effect, but can only be applied to matters arising after their passage,⁵ and cannot create a civil liability in favor of persons injured by reason of the non-compliance of parties therewith.

Thus, while a municipal corporation may be clothed with authority to provide for the removal of snow and ice upon side-

¹ *Milne v. Davidson*, 5 *Martin* (La.), 410.

² *Nolin v. Mayor*, 4 *Yerger* (Tenn.), 163; *Studhorse*; *Columbia v. Duke*, 2 *Strab.* (S. C.) 530.

³ *Meyowam v. Com.*, 2 *Met.* (Ky.) 3; *McAllister v. Clark*, 33 *Conn.* 91; *Shafer v. Munma*, 17 *Md.* 381; *Childress v. Mayor*, 3 *Sneed* (Tenn.), 163; *Tanner v. Albion*, 5 *Hill* (N. Y.), 121; ball alley held a nuisance at common law, and abatable as such under the village by-law. But the authority of this case is seriously doubted, and is not believed to be entitled to weight as an authority upon this point. *Updike v. Campbell*, 4 *E. D. Smith* (N. Y.), 570; *State v. Hall*, 32 *N. J.* 158.

⁴ It may prohibit and punish fast driving in the streets. *Com. v. Worcester*, 3 *Pick.* (Mass.) 462. It may impose penalties for mutilating or destroying ornamental trees planted upon public grounds or streets. *State v. Merrill*, 37 *Me.* 329. It may regulate the laying out of cemeteries and the burial of the dead within its limits. *Mayor v. Stack*, 3 *Wheeler's Cr. Cas.* (N. Y.) 237; *Church v. Mayor of N. Y.*, 5 *Cowen* (N. Y.), 538; *Coates v. Mayor*, 7 *id.* 585; *Bogert v. Indianapolis*, 13 *Ind.* 134; *Austin v. Murray*, 16 *Pick.* (Mass.) 121; *Musgrove v. Church*, 10 *La. An.* 431; and may regulate the removal of bodies interred in its cemeteries. *Com. v. Goodrich*, 13 *Allen* (Mass.), 546. It may establish fire limits and prevent the building or repairing of wooden buildings. *Brady*

v. Ins. Co., 11 *Mich.* 425; *Forsyth v. Mayor*, 45 *Ga.* 152; 12 *Am. Rep.* 576. It may prohibit restaurants and drinking saloons from being kept open after certain hours. *State v. Freeman*, 38 *N. H.* 426. It may prevent the peddling of meat, game or poultry about the streets. *Shelton v. Mobile*, 30 *Ala.* (U. S.) 546. It may, if authorized by its charter to regulate the erection of buildings, provide by ordinance for a license fee therefor. *Welch v. Hotchkiss*, 37 *Conn.* 140. But it cannot, by ordinance, impose unreasonable and oppressive burdens upon its citizens. *Clinton v. Phillips*, 58 *Ill.* 102; 11 *Am. Rep.* 52; *Mayor v. Winfield*, 8 *Humph.* (Tenn.) 767; *Fisher v. Harrisburgh*, 2 *Grant's C.* (Penn.), 281; *Kip v. Paterson*, 2 *Dutcher* (N. J.), 289; *Com. v. Stiffe*, 7 *Bush* (Ky.), 161; In *City of St. Charles v. Nolle*, 51 *Mo.* 122, it was held that an ordinance requiring all hacks, drays, etc., to be licensed, did not apply to vehicles used in hauling goods into and out of the city, and that the legislature could not confer upon the city any power to impose a license fee upon them. But see *Riddle v. Phila. R. R. Co.*, 1 *Pitts.* (Penn.) 77, where the contrary doctrine is held in certain cases.

⁵ *Newlan v. Aurora*, 14 *Ill.* 364; *Howard v. Corporation of Savannah*, *Charlt. (Ga.)* 173. But see *State v. Johnson*, 17 *Ark.* 407, as to the effect of an ordinance establishing a tribunal to try contested election cases.

walks in front of premises, by the owner thereof, and may possess the power to impose fines for such neglect on the part of the owner or occupant, yet this does not confer upon it the power to impose a civil liability upon such owner or occupant, in favor of any person injured thereby, when no such liability exists by law.¹

SEC. 742. While a municipal corporation may provide by ordinance for the prevention and removal of, yet it cannot license a

¹ In *Kirby v. Boylston Market Ass.*, 14 Gray (Mass.), the city of Boston passed an ordinance making it the duty of every owner and occupant of property upon the line of public streets, to remove the snow and ice from the walks in front of their premises, before ten o'clock each day. The defendants neglected to comply with the ordinance, and the plaintiff in passing the defendant's premises, slipped upon the ice and fell, receiving severe injuries therefrom. The court held that no liability existed against the defendants; that the by-law created no civil liability on the part of the property owners, and that the only penalty incident to its breach was that provided by the by-law itself.

In *Van Dyke v. Cincinnati and Harbeson*, 1 Disney (Superior Ct., Ohio), 532, the city of Cincinnati provided by an ordinance that the owners of property upon its streets should, before the hour of ten o'clock each day, remove the snow and ice from the sidewalks in front of their property, and imposing a penalty of five dollars for a failure to perform such duty. The plaintiff, in passing the premises of the defendant, Harbeson, at about two o'clock in the afternoon of December 27th, 1856, slipped upon the ice and received severe injuries. He brought an action therefor, against the city and Harbeson, jointly. In disposing of the question as to Harbeson's liability, SPENCER, J., said: "As the owner of the adjacent property, there was no common-law duty upon the defendant, Harbeson, to remove this obstruction. It is not claimed that he is a public officer charged with the performance of this particular duty, and no statutory liability is shown. * * * So far as it is claimed that the enactment of such an ordinance creates a positive duty, on the

part of owners of property, to clear their sidewalks of the obstructions named, the neglect of which is to make them answerable for the consequences to such as may suffer therefrom, no matter to what extent, *we deny that the city council has the power to impose any such obligation.* * * * The ordinance imposed upon Harbeson a duty to the public alone, which can only be enforced by the penalty prescribed, and the non-compliance of which does not subject him to a civil action, at the suit of a private person."

In the case of *Adm'r of Chambers v. The Ohio Life and Trust Ins. Co.*, 1 Disney (Ohio Sup. Ct.), 327, a question as to the power of a municipal corporation to create a civil liability on the part of property owners was considered. In that case, the defendants in the erection of their banking building upon a public street in Cincinnati, erected the cornice so that it slightly projected over the line of the street, and being insecurely fastened, it fell, and falling upon the plaintiff's intestate, instantly killing him. Among other grounds of recovery, it was insisted by the plaintiff that a recovery could be had because the building was erected in violation of the provisions of an ordinance of the city. GHOLSON, J., in commenting upon this branch of the case, said: "It is sufficient to say that, as to any liability in a civil action, these ordinances have no controlling application. The city has no authority by ordinance to license a nuisance so as to protect a party from liability for it in a civil action, nor to subject a party to liability in a civil action for an act, where, but for the ordinance, no liability would exist. No such authority is conferred upon the municipal authority of a city. It belongs to the general legislation of the State."

nuisance,¹ nor can it maintain a nuisance upon city property, but is subject to the same liabilities and remedies therefor at the suit of persons injured, or in behalf of the public, as an individual would be.² Neither does the fact that a certain use of property is declared a nuisance by a city ordinance, although subjecting the person erecting it to the penalties provided in the ordinance, necessarily make the person who uses his property contrary to the provisions of the ordinance liable to third persons for injuries sustained therefrom. The ordinance has no effect to create a civil liability on the part of the owner of the property, and no liability exists to third persons, unless it exists at common law or by statute.³ It is extremely doubtful whether a municipal corpo-

1. *Pfau v. Reynolds*, 53 Ill. 212; *Adm'r of Chambers v. Ins. Co.*, 1 Disney (Ohio), 336; opinion by GHOLSON, J. In *Ryan v. Capes*, 11 Rich. (S. C.) 217, a cotton press was held a nuisance, although established under a license from the city, and the license was held to be no protection. *State v. Gaslight Co.*, 18 Ohio St. 262; *Hume v. New York*, 47 N. Y. 639; *Seaman v. New York*, 3 Daly (N. Y.), 147; *Morey v. Troy*, 61 Barb. (N. Y.) 580. A building erected in a street for a market, jail, etc., was held a nuisance, and its maintenance restrained. *Sutterloh v. Cedar Keys*, 15 Fla. 306.

² In *Brower v. The Mayor of New York*, 3 Barb. (N. Y. S. C.) 255, the city was restrained from permitting a portion of its premises on the East river from being used as an emigrant depot.

In *St. John v. The Mayor of N. Y.*, 3 Bos. (N. Y.) 483, it was held that the city was liable for a nuisance in using a part of a public street for the erection of sheds for occupation as market places. But the city is not liable for a nuisance upon its property, when the nuisance arises while the property is in the exclusive possession and control of the board of education, and is wholly controlled by that board. *Terry v. The Mayor of N. Y.*, 8 Bos. (N. Y.) 504.

In *Leavenworth v. Carey, McCahon (Kansas)*, 124, the city was held liable for injuries resulting from a sewer improperly constructed, so that water escaped therefrom into the respondent's cellar. But it seems that liability does not exist unless the work is unskillfully executed either in its mechanism or capacity. *Indianapolis v. Haffer*, 30 Ind. 235. But a city cannot escape liability for an injury resulting to one from a defect in its streets, even though the defect arose from the con-

struction of a public work, as a sewer, and although the defect arose from the fault of a contractor. *Springfield v. St. Clair*, 49 Me. 476.

In *Reinhardt v. New York*, 2 Daly (N. Y. C. P.), 243, it was held that it is the duty of a city to keep its streets at all times in a safe condition, and that it is liable for injuries to persons lawfully using the streets, resulting from defective coal plates or gratings, and that notice of the defect need not be proved, as it will be presumed. It is no defense in an action for injuries resulting from defective areas, to show that such areas exist in other places, and are common in the city. *Temperance Hall Association v. Giles*, 33 N. J. 260; *Parker v. Macon*, 39 Ga. 725; *Champaign v. Patterson*, 50 Ill. 61; *Oliver v. Worcester*, 102 Mass. 487; *Rowell v. Williams*, 29 Iowa, 210; *Chicago v. Johnson*, 53 Ill. 91; *Chicago v. Langlass*, 52 id. 256; *Covington v. Bryant*, 7 Bush (Ky.), 249; *Winporny v. Philadelphia*, 65 Penn. St. 165. But where the nuisance results from the act of an individual the city may have a remedy over for all damages. *Swerin v. Eddy*, 53 Ill. 189; *Chicago v. Robbins*, 2 Black (U. S.), 164. The same liability attaches against a city for a nuisance created by it or upon its property, as to an individual, and it has no more right to maintain a nuisance than an individual would have. *Harper v. Milwaukee*, 30 Wis. 365; *Dorman v. Jacksonville*, 13 Fla. 538; *Donahue v. New York*, 4 Daly (N. Y. C. P.), 65.

³ GHOLSON, J., in *Adm'r of Chambers v. Ohio Trust & Ins. Co.*, 1 Disney (Ohio), 336.

ration, clothed with express power by legislative enactment, to license slaughter-houses and other noxious trades to be carried on within its corporate limits, can grant a license, which operates as a protection against liability for damages, to an individual to carry on such business, so as to operate as an actual nuisance to individuals owning property within the sphere of its influence. Any trade, the exercise of which operates as an *invasion of the rights of others*, whether by sending over the premises of others a stream of polluted air, or otherwise *takes the property* of others to the extent of the injury and damage inflicted, and even the legislature is powerless to give such authority, without providing for full compensation. A license thus given will operate as full protection against indictment or suits in behalf of the public, or of tenants in possession of property affected thereby, but not against actions brought by the owners of estates actually injured by the nuisance.¹

SEC. 743. A municipal corporation is liable to indictment for a public nuisance maintained by it, and is also liable for damages at the suit of an individual who sustains special damages therefrom.² But in order to uphold a private action the injury resulting from the nuisance must be special and particular, and not such as is sustained by all the public in common.³ If it allows its streets to remain out of repair,⁴ or if it neglects to abate nuisances injurious to the health of its citizens, which it has the power to remove,⁵ or if it permits any public nuisance to exist upon its property,⁶ it may be indicted and punished the same as an individual.⁷ As to what state of non-repair in streets will uphold an indictment, is necessarily a question of fact, and depends upon the circumstances of each case. It is proper to consider

¹ See chapter on Legalized Nuisances.

² *Brower v. Mayor of New York*, 3 Barb. (N. Y.) 2521; *Hunt v. The Mayor of Albany*, 9 Wend. (N. Y.) 571; *The People v. Albany*, 11 Wend. (N. Y.) 539; *Baker v. Boston*, 12 Hick. (Mass.) 184; *Thayer v. Boston*, 19 Pick. (Mass.) 291.

³ *Doolittle v. Supervisors*, 18 N. Y. 155.
⁴ *State v. Shelbyville*, 4 Sneed (Tenn.), 176; *Davis v. Bangor*, 42 Me. 522; *Phillips v. Com.*, 44 Penn. St. 197; *State v. Hudson*

County, 1 Vroom. (N. J.) 137; *Cambridge v. R. R. Co.*, 7 Metc. (Mass.) 70.

⁵ *Baker v. Boston*, 12 Pick. (Mass.) 184.

⁶ *St. John v. The Mayor*, 3 Bosw. (N. Y.) 483.

⁷ *Administrator v. Insurance Co.*, 1 Dis. (Ohio) 336; *Harper v. Milwaukee*, 30 Wis. 365.

As for digging ditch near a person's premises, and causing stagnant water to accumulate there, and causing a stench and generating malaria. *Hamilton v. Mayor, etc., of Columbus*, 52 Ga. 435. Or erecting a sewer and emptying it into a canal, which impairs navigation by reason of deposits made therein. *Boston Rolling Mills v. Cambridge*, 117 Mass. 396; *Clark v. Peckham*, 10 R. I. 35.

how the defects arose, the ability of the city to repair, the location of the street, the length of time the defects have existed, and all the circumstances tending to charge or excuse the city for its neglect.¹

SEC. 744. When a municipal corporation has ample power to remove a nuisance that is injurious to the health, endangers the safety, or impairs the convenience of its citizens, or, when in the prosecution of a public work it creates a nuisance, it is liable for all the injuries that result from a failure on its part to properly exercise the power possessed by it, and for the injuries resulting from its wrongful acts.²

¹ Hart v. The Mayor, ante; People v. Albany, ante.

² In Thurston v. The City of St. Joseph, 51 Mo. 510; 11 Am. Rep. 463, it was held that a city was liable, irrespective of the question of negligence, for the flooding of premises resulting from the building a sewer by it in the vicinity of the plaintiff's premises. That such injuries amounted to a taking of property within the constitutional provision.

In Wilson v. The City of New Bedford, 108 Mass. 261, the city was held liable for injuries resulting to the plaintiff from water percolating through his soil into his barn and cellar, from a reservoir erected by the city to obtain a supply of water, no negligence was imputed or shown. The court placed the liability of the city upon the same ground with that of an individual doing a similar act. The injury having resulted from the raising of the water by artificial means which pressed the water through the soil, the reservoir, as to the plaintiff, was a nuisance and the city was liable for all the natural and probable consequences resulting from its erection.

Phinze v. Augusta, 47 Ga. 263; Savannah v. Cullens, 38 id. 334; New York v. Furze, 3 Hill (N. Y.), 614; Bacon v. Boston, 3 Cush. (Mass.) 179; Raymond v. Lowell, 6 id. 529; Kelsey v. Glover, 15 Vt. 715; Chamberlain v. Enfield, 43 N. H. 356; Bailey v. New York, 3 Hill (N. Y.), 531; Brown v. New York, 3 Barb. (N. Y.) 254; Buffalo & Hamburg T. Co. v. Buffalo, 1 N. Y. S. C. 537; Pittsburgh v. Grier, 21 Penn.

St. 51; Com'rs v. Wood, 10 Barr (Penn.), 93.

In Gilmartin v. Philadelphia, 71 Penn. St. 140, the city was held chargeable for injuries resulting from a nuisance created by it by drawing off the water of a navigable stream during a dry season for the use of the city. In this case the right of the city to use the water of a navigable stream for primary purposes was fully recognized but the court held that the right ended with the supply for that use, and that as by much the greater proportion of the water taken was for the supply of motive power, the cleaning of the streets, etc., it was held liable for the damages resulting to those specially injured thereby.

In Parker v. Macon, 39 Ga. 725, which is a well-considered case and one that must necessarily be regarded as a leading case upon the liability of cities for damages resulting from a failure on its part to remove nuisances which it has full power to remove, it was held that a city is liable for injuries resulting from a failure on its part to keep its streets, lanes and walks free from obstructions, such as steps, fences, posts or other nuisances existing therein or dilapidated walls along the street in such a state of decay as to endanger the safety of persons passing along the street. And that the fact that these nuisances are upon private property, is no excuse for its failure to remove them or defense against an action for injuries resulting from its neglect.

Hyde v. County of Middlesex, 2

SEC. 745. There is a wide distinction between the liabilities of a municipal corporation for acts done exclusively for a public purpose, and in furtherance of the public interests and convenience, and those done for its own private purposes or advantage. This distinction has nowhere been more forcibly stated, than by NELSON, J., in *Bailey v. New York*, 3 Hill (N. Y.), 531, where the learned judge showed the distinction between the public and the private action of a city government. When the city is doing an act for the benefit of the public, in the improvement of its streets, in the erection of public works which operate as a public benefit, in the improvement of navigable streams, in improving the sanitary condition of the city, it is only liable for the negligent or careless execution of its duty; but, when the work is private, or for its own private advantage or emolument, it is liable for all damages resulting therefrom, irrespective of the question of negligence, precisely as an individual would be.¹

CHAPTER TWENTY-THIRD.

LEGALIZED NUISANCES.

SEC. 746. What acts are excused by legislative grants.

747. Obligations resting upon public companies in the discharge of their powers.

748. Same continued.

749. Authority to erect bridges over navigable streams.

750. Exemption from indictment for public nuisances.

751. Liable to indictment in certain cases.

752. Power of the legislature.

Gray (Mass.), 267; Trustees v. Gibbs, 11 H. L. Cas. 687; Thayer v. Boston, 19 Pick. (Mass.) 511; Oliver v. Worcester, 102 Mass. 490.

In *Eastman v. Meredith*, 36 N. H. 284, the liability of towns and municipal corporations generally, are put upon the same ground and the same footing as that of individuals in the use and control of the same property.

In *St. John v. The Mayor*, 3 Bos. (N. Y.), it was held that the city of New

York had no authority to obstruct any part of a public street by making erections thereon, as in this case, of sheds for market places any more than an individual, and was liable for all the damages resulting from the nuisance.

¹ *Oliver v. Worcester*, 102 Mass. 489; *Thayer v. Boston*, 19 Pick. (Mass.) 511; *Anthony v. Adams*, 1 Met. (Mass.) 284; *Pittsburgh v. Grier*, 22 Penn. St. 54; *Eastman v. Meredith*, 36 N. H. 296; *Trustees v. Gibbs*, 11 H. L. Cas. 687.

SEC. 753. Legislative grants do not exempt company from liability for private damages in certain cases.

754. Implied condition, that the work shall be properly exercised.

755. What is a taking of property.

756. Power of Parliament, in England, omnipotent.

757. No remedy can be had for injuries purely consequential, etc.

SEC. 746. The question as to how far legislative authority to do an act, which otherwise would be a nuisance, operates to shield those to whom the authority is given, from liability for damages sustained by others therefrom, is one of great importance, and one which has often engaged the attention of courts, and which is now far from being definitely settled.

It may, however, be stated, that a person or corporation authorized by law to do a particular thing, as to build a railroad,¹ a turnpike,² a bridge across a navigable stream,³ or to carry on a particular class of business, or for the manufacture of gas to supply the people of a town or city therewith,⁴ so long as they keep within the scope of the power granted, are completely protected from indictment and punishment for a public nuisance, and from proceedings either at law or in equity in behalf of the public therefor.⁵ But this is subject to this qualification, that the nuisance arises as a natural and probable result of the act authorized, so that it may fairly be said to be covered in legal contemplation by the legislature conferring the power.⁶ If the

¹ *Rex v. Pease*, 4 B. & A. 30; *Rex v. Morris*, 1 id. 441.

² *State v. Williamstown Turnpike Co.*, 4 Zab. (N. J.) 247; *State v. Clarks-ville R. & T. Co.*, 2 Sandf. (Tenn.) 88; *Com. v. Hancock Free Bridge*, 2 Gray, (Mass.) 58; *State v. Scott*, 2 Swan. (Tenn.) 332; *Beckett v. Upton*, 33 Eng. L. & Eq. 108.

³ *Jolly v. Terre Haute Draw-bridge Co.*, 6 McLean (U. S.), 237; *Attorney-General v. Hudson River R. Co.*, 1 Stark. (N. J.) 526; *State v. Parrott*, 71 N. C. 311.

⁴ *People v. Gas-light Co.*, 64 Barb. (N. Y.) 55; *Broadbent v. Imperial Gas Co.*, 7 H. L. 605; *Carhart v. Auburn Gas-light Co.*, 22 Barb. (N. Y.) 297.

⁵ *People v. Law*, 34 Barb. (N. Y.) 294; *People v. N. Y. Gas-light Co.*, 64 id. 55; *Carhart v. Auburn Gas-light Co.*, 22 id. 297; *People v. Platt*,

17 Johns. (N. Y.) 195; *Davis v. Mayor*, 14 N. Y. 506; *Com. v. Reed*, 34 Penn. St. 275; *Harris v. Thompson*, 9 Barb. (N. Y.) 350; *Rex v. Pease*, 4 Brad. 30.

⁶ In *Attorney-General v. Bradford Navigation Co.*, 6 B. & S. 631, the defendants were authorized to construct and maintain a canal which they proceeded to do in 1774. In 1802 they erected a dam across a stream called Bradford Beck and made a reservoir of stone at the head of the canal into which the water was and held in reserve to supply the canal when the water therein was low. The water thus turned into the canal was impregnated with sewage and by standing in the canal emitted noxious and unwholesome odors to the nuisance of those living in the vicinity of the canal. This action was brought to restrain the company from turning into this

nuisance is not the necessary result of the act or work authorized, or if it might be exercised in such a way as to obviate the nuisance, legislative authority will not be inferred from the grant to create the nuisance, and will not operate as a protection or excuse therefor either against an indictment or a suit in behalf of the public at law or in equity to abate the nuisance.¹ Hence it is only when the nuisance is a *necessary* and *probable* result of the act done in pursuance of legislative authority that the grant operates as a protection against indictment or suit therefor. Otherwise it cannot be said to have been contemplated by the grant, and therefore is not authorized by it.²

canal any further sewage or other matter calculated to create a nuisance. The defendants admitted that the nuisance existed but insisted that as they had the right to use the water of Bradford Beck for the purposes of their canal, and that, as they did not pollute the water of the stream or impregnate it with sewage, they could not be made answerable for the nuisance resulting from its use. It appeared that when the canal was built, and down to within three or four years before the commencement of the action the water of Bradford Beck had been pure, and that the impurity arose from leading into the Beck the sewage from the town of Bradford, which, within a few years, had largely increased in population, so that, although the water was impure, no deposit of an offensive kind took place. The water in the canal was stagnant, and there was no current or flow of water, and the sewage was deposited in the canal, so that when boats passed through it it emitted very offensive smells and gases. The court held that although the company was authorized by parliament to construct the canal, and feed it with the water from Bradford Beck, yet, as at that time the water was clear and pure, it could not be held as having been contemplated by parliament that the water would become so impure as to make its use in the canal a public nuisance, and the use of the water was enjoined, as well as a use of the canal in any way so as to create a public nuisance by reason of noxious smells emitted from the water used therein.

¹ Attorney-General v. Metropolitan

Board of Work, 1 H. & M. 320; Clark v. R. R. Co., 36 Mo. 292, in which it was held that an action would not lie for damages arising from the overflow of land occasioned by the proper construction of their road-bed. But this applies only to injuries sustained by one whose land is taken and whose damages have been assessed. Attorney-General v. Birmingham, 4 K. & J. 523; Imperial Gas Co. v. Broadbent, 7 H. L. Cas. 605; Stainton v. Woolrych, 23 Beavan, 225; Hutton v. R. R. Co., 7 Ha. 259; R. R. Co. v. Archer, 6 Paige (N. Y.), 83; Sandford v. R. R. Co., 24 Penn. St. 378, while companies acting under legislative power are the best judges of the manner in which their works are to be constructed, yet, if they are proceeding to execute them in such a manner as to do unnecessary damage, or inflict unnecessary injury, they are liable therefor. London, etc., R. R. Co. v. Canal Co., 1 Ra. Cas. 225; Coates v. Clarence R. R. Co., 1 R. & M. 181; Rex v. East and West India Docks R. R. Co., 2 Ra. Cas. 380.

² Attorney-General v. Bradford Navigation Co., 6 B. & S. 631; People v. Gas-light Co., 64 Barb. (N. Y.) 55. In Clark v. Mayor of Syracuse, 13 Barb. (N. Y.) 32, the legislature declared a stream navigable, and afterward authorized the plaintiff to erect a dam upon it. It was held by the court that this authority only protected the plaintiff from the consequences of the nuisance to navigation, and was no protection for nuisances occasioned by the dam in other respects.

In Richardson v. Vermont Central R. R. Co., 25 Vt. 465, it was held that where the defendant in the erection

SEC. 747. So, too, where a person or corporation is vested with authority by the legislature to do an act which, unless carefully and skillfully done, will operate injuriously to the public or to individuals, they are bound to execute the power in *good faith*, and to exercise the highest degree of care to prevent injurious results, and it is only against those acts which, in the exercise of such care and skill, operate injuriously, that their grant operates as an excuse or defense. If negligence can in any measure be predicated of their acts, they are liable for all the consequences civilly and criminally, resulting therefrom. The rule is, that where a corporation or an individual are authorized to do an act, which is in derogation of private rights, they are bound to exercise the power given, with moderation and discretion, and not negligently. Thus, where a railroad company were authorized to make excavations for their road-bed, it was held that they were bound to make them with reasonable regard to the rights of adjoining owners, and when they were proceeding with the work without taking sufficient precaution to secure the safety of an adjoining house, they were restrained from proceeding until such precautions were properly provided for, and an inquiry as to damages was granted.* When the company can exercise its rights in a way that will not be productive of injury to private rights, it is bound so to exercise it, and a court of equity will always interfere to prevent their exercise in a vexatious or careless way.* If there are two modes in which the work can be done, one of which would create a nuisance, and the

of its railroad made an excavation upon its own land so near to the plaintiff's land adjoining that his land slid into the excavation, the defendants were liable for the injury. In this case no part of the plaintiff's premises were taken by the defendants for the purposes of their road, and the liability of the defendants, for injuries resulting to the plaintiff, was placed upon the same ground as though they had been occasioned by an individual owning the adjoining tract. BENNETT, J., in a very able opinion, which occupies the position of a leading opinion upon questions of this character, said: "There is no pretense that the railroad

company, in digging the excavation on their own land, were in the wrong; neither in so doing did they remove any of the plaintiff's soil directly, *but the slide was a consequence of it.* * * * They cannot justify the removal of the plaintiff's soil from any powers attempted to be conferred upon them, either by their charter or the general railroad law."

¹ *Biscoe v. Great Eastern Railway Co.*, 10 L. R. Eq. Ca. 640.

² *Rickett v. Metropolitan Railway*, 2 H. L. 175.

³ *R. R. Co. v. Canal Co.*, 1 Ra. Ca. 225.

other not, they are bound to choose the method which will obviate the nuisance.¹

SEC. 748. Thus it is held that authority given to construct a railroad, and to operate it by steam, does not operate as an authority to use engines thereon that are defectively constructed, so as

¹ In *Matthews v. West London Water Works Co.*, 3 Camp. 403, the defendants were authorized to make excavations in the street to lay their water pipes. In doing so they threw up rubbish without properly guarding the same, whereby a stage coach, which the plaintiff was driving, was overturned and injured, and he, plaintiff, severely injured. Lord ELLENBOROUGH held that the company was clearly liable, even though the work was done by a contractor.

In *Waterman v. Conn. & Pass River R. R. Co.*, 30 Vt. 610, damages were allowed for injuries from surface water, through the unskillful manner in which the road was constructed. But see *Henry v. Vt. Central R. R. Co.*, 30 id. 638, where injury to land resulting from change in the course of a river by a railroad company in necessary erection of their road, was held not recoverable, though such erections were unskillfully made. *Robinson v. N. Y. & Erie R. R. Co.*, 27 Barb. (N. Y.) 512.

It must lay its track skillfully in a public street, and is liable for injuries resulting from unskillfulness in that respect. *Wooster v. Forty-second Street R. R. Co.*, 50 N. Y. 203.

It must not let down the lands of an adjoining owner whether by skillful or unskillful prosecution of its work. *Richardson v. Vt. Central R. R. Co.*, 25 Vt.

Authority to erect a bridge over a navigable stream, if the navigation is not impeded, does not authorize it even temporarily to obstruct it while erecting the bridge. *Memphis & Ohio R. R. Co. v. Hicks*, 5 Sneed (Tenn.), 427.

In *Lawrence v. Great Northern R. R. Co.*, 4 Eng. Law & Eq. 265, held liable for not providing proper flood-gates for escape of water, which by erection of its road-bed were prevented from spreading as formerly, even though the act did not provide for their being made.

In the *Freehold General Investment Co. v. The Metropolitan R. R. Co.*, Weekly Notes, 1866, p. 66, the defendants in the construction of their road were building tunnels under valuable houses, and among the rest, under the plaintiff's house. Upon a bill for an injunction to restrain them from proceeding until they had provided proper means for securing the house from further injury—the walls having already begun to crack—the Vice Chancellor in disposing of the question said: "The Legislature has given power to the defendants to make their works by means of a tunnel, close to and through the midst of valuable houses, and must have foreseen that some damage would be done. * * But the company are not only bound to make compensation for the damage sustained, but are bound to prosecute the work skillfully, and, if there are two ways of doing the work, to choose the one that will do the least injury."

In *Regina v. No. Staffordshire R. R. Co.*, 8 E. & B. 836, it was held that a railroad company having carried a highway over its road by a bridge, was bound at all times not only to keep the bridge in repair, but also all approaches thereto.

In *Hamden v. N. H. R. R. Co.*, 27 Conn. 158, it was held that a railroad company altering a highway for the purposes of its road, is bound to restore it to its former condition, and that this liability continues until it is so restored, and until that is done, that it remains a continuing nuisance rendering it liable for all damages, either to the town or individuals.

In *Regina v. Train*, 2 B. & S. 640, an iron tramway laid in a highway so as to cause the wheels of vehicles to skid and to frighten horses, hitting their feet on them, is a nuisance, and that no degree of public benefit will operate as a defense.

In *Johnson v. Atlantic R. R. Co.*, 35 N. H. 567, it was held that it is the

to scatter coals along the line of the road, endangering the property of those through whose lands it passes,¹ nor with smoke-stacks so defectively constructed as to permit the free escape of sparks from the engine or engines, exposing property on the line of the road to imminent danger from fire.² Neither does it authorize a constant ringing of the bell or blowing of the whistle to the annoyance of people living along its line, but only such necessary use of those devices as the public safety and the proper running of the trains requires.³ The noise and rumble of the trains, the smoke escaping from the engines, and the jarring occasioned by the proper operation of the road, must be borne as *damnum absque injuria*, but the best and most improved devices must be used that skill and science has devised, to prevent injury from the exercise of the powers given by the grant, either to public or individual rights.⁴ When

duty of a railroad company to construct culverts and ditches sufficiently low to carry off water set back upon lands by the construction of its road, when this can be done without difficulty.

In *Sabin v. Vt. Central R. R. Co.*, 25 Vt. 363, defendant held liable for not removing stones thrown upon land in process of blasting for their road-bed.

In *Pittsburgh, etc., R. R. Co. v. Giellesland*, 56 Penn. St. 445, it was held that a culvert so unskillfully constructed as to be insufficient to carry off the water of a stream in ordinary high water, renders the company liable for all injuries resulting therefrom. *Slatten v. Des Moines Valley R. R. Co.*, 29 Iowa, 154; *Terre Haute, etc., R. R. Co. v. McKinley*, 33 Ind. 274; *Taylor v. Grand Trunk R. R. Co.*, 48 N. H. 304; *Attorney-General v. Metropolitan Board of Works*, 1 H. & M. 320; and the question of proper execution of the works is a question of fact. *Ware v. Regents Canal Co.*, 3 D. & J. 227; *Coats v. Clarence R. R. Co.*, 1 R. & M. 181.

¹ *King v. Morris & Essex R. R. Co.*, 3 C. E. Green (N. J.), 377; *Cleveland v. Grand Trunk Railroad Co.*, 42 Vt. 449.

² *Gandy v. Chicago, etc., R. R. Co.*, 30 Iowa, 420. See *Jackson v. Same*, 31 id. 176; *Kellogg v. Chicago, etc., R. R. Co.*, 26 Wis. 223; *Bedell v. Long*

Island R. R. Co., 44 N. Y. 367; *Case v. Northern Central R. R. Co.*, 59 Barb. (N. Y.) 644. And the fact that a fire is set by sparks from a railroad engine is presumptive evidence that the spark protector is defective and throws the burden of the proof of the contrary upon the company.

Bedford v. Hannibal, etc., R. R. Co., 46 Mo. 456; *Case v. Northern Central R. R. Co.*, ante. See as to presumption of defects in machinery, *Illinois Central R. R. Co. v. Phillips*, 49 Ill. 234; *Reed v. New York Central R. R. Co.*, 56 Barb. (N. Y.) 493. But see *Indianapolis R. R. Co. v. Paramore*, 31 Ind. 143; *Fitch v. Pacific R. R. Co.*, 45 Mo. 322; *Barron v. Eldridge*, 100 Mass. 455.

³ *First Baptist Church Society v. R. R. Co.*, 5 Barb. (N. Y.) 79.

⁴ *Bell v. Railroad Co.*, 25 Penn. St. 161; *Brand v. Hammersmith R. R. Co.*, 1 L. R. (Q. B.) 130; *Sparhawk v. Union, etc., R. R. Co.*, 54 Penn. St. 401; *Burton v. Philadelphia R. R. Co.*, 4 Har. (Del.) 252. But where the noise is unnecessary, the rule is otherwise, or when the use complained of can be dispensed with in a populous locality *Mumford v. Wolverhampton*.

In *Cooper v. North British R. R. Co.* 35 Jurist, 295; 2 Machp. (Sc.) 499, when authority was given to defendants to erect workshops to manufacture machinery, apparatus, etc., it was

this is done, the grant is a full protection ; failing in that, it is no protection at all to the extent of the injury occasioned or threatened by such neglect, and for the injuries resulting therefrom, it is liable both to indictment in behalf of the public, and to respond in damages to individuals injured thereby.¹

SEC. 749. Authority given to erect a bridge across a navigable stream, even in the absence of a provision that it should be erected with proper draws, and in such a way as to interfere as little as possible with navigation, would undoubtedly be held to be subject to such restrictions, but, as that question will not be likely to arise, it will not be profitable to discuss it here. It is sufficient to say that when authority is given to erect a bridge over a navigable stream in such a way as to interfere as little as possible with its navigation, the authority does not operate as a protection, if the bridge interferes with navigation in any degree unnecessarily, which, by a more skillful construction, or by the adoption of other methods or better appliances, might be avoided.²

SEC. 750. An individual or corporation acting strictly within the scope of legislative power cannot be indicted for a public nuisance. The legislative grant is a license to do the act and operates as a complete and full immunity from prosecution, either civilly or criminally, on the part of the public.³ But it by no means follows that because an act is done under legisla-

held that this would not justify the erection of a shop for hardening rails in a locality where the noise would be a nuisance.

¹ *Costello v. Syracuse, etc., R. R. Co.*, 65 Barb. (N.Y.) 92; *Chicago v. Quaintance*, 58 Ill. 389; *Spaulding v. Chicago, etc., R. R. Co.*, 30 Wis. 110; *King v. Morris & Essex R. R. Co.*, 3 C. E. Green (N.J.), 277; *Queen v. Darlington Board of Health*, 5 B. & S. 562; *Brine v. Great Western R. R. Co.*, 2 id. 402; *Broadbent v. Imperial Gas Co.*, 7 D. M. & G. 600; *Caledonian R. R. Co. v. Sprot*, 3 Macph. 838.

² *State v. Parrott*, 71 N. C. 311; *Jolly v. Terre Haute Bridge Co.*, 6 McLean (U. S.); *Columbus Ins. Co. v. Peoria Bridge Association*, id.; *Columbus Ins. Co. v. Curtenas*, id.; *Attorney-General*

v. Hudson River R. R. Co., 1 Stockt. (N. J.) 526; *Newark Plank Road Co. v. Elmer*, id. 754; *Com. v. New Bedford Bridge Co.*, 2 Gray (Mass.), 339; *Com. v. Nashua & Lowell R. R. Co.*, 2 id. 54; *Com. v. Erie & N. E. R. R. Co.*, 27 Penn. St. 339.

³ *People v. Law*, 34 Barb. (N. Y.) 294; *Hogboom, J. People v. Manhattan Gas Co.*, 64 id. 55; *Davis v. R. R. Co.*, 16 N. Y.; *Crittenden v. Wilson*, 5 Cow. (N. Y.) 163; *People v. Platt*, 17 Johns. (N. Y.) 195; *State v. Stoughton*, 5 Wis. 271; *Com. v. Reed*, 34 Penn. St. 375; *Harris v. Thompson*, 9 Barb. (N. Y.) 350; *Carhart v. Auburn Gas Co.*, 2; id. 297; *Rex v. Pease*, 4 B. & Ad. 302; *Clark v. Syracuse*, 13 Barb. (N. Y.) 32; *Anderson v. R. R. Co.*, 9 How. (N. Y.) Pr. 553.

tive authority, that the person doing the act cannot be punished therefor by indictment if the act creates a public nuisance. If the act is in excess of the power given,¹ or if it is done in a manner not within the reasonable contemplation of the legislature, to be gathered from a fair construction of the grant — as if it is not a necessary and probable result of the exercise of the power given — the act will be no protection against liability, both civilly and criminally.² It is only against such consequences as are fairly within the contemplation of the legislature in conferring the authority, and such results as are necessarily incident to its being done — in other words, such results as are the natural and probable consequence of an exercise of the power at all — that the grant operates as a protection.³ Beyond that it affords no protection whatever. It is sometimes laid down in elementary works, and appears in the opinions of courts, that that which is authorized by the legislature cannot be a nuisance. This is clearly erroneous in the sense in which it is generally understood. That which is authorized by the legislature, within the strict scope of the power given, cannot be a *public* nuisance, but it *may* be a *private* nuisance, and the legislative grant is no protection against a private action for damages resulting therefrom.⁴

¹ Com. v. Old Colony R. R. Co., 14 Gray (Mass.), 93; Donnahue v. State, 8 Sm. & M. (Tenn.) 549; Glover v. North Staffordshire R. R. Co., 16 Q. B. 912; Hentz v. L. I. R. R. Co., 13 Barb. (N. Y.) 646; In Re Penny, 7 E. & B. 660; Mares v. R. R. Co., 21 Ill. 516; Imperial Gas-light Co. v. Broadbent, 7 H. L. 600; Ware v. Regents Canal Co., 3 D. & G. 227; Frewin v. Lewis, 4 M. & C. 255; Oldaker v. Hunt, 6 D. M. & G. 389; Caledonian R. R. Co. v. Colt, 3 Mac. & G. 838; New Albany R. R. Co. v. O'Dailey, 12 Ind. 557; Brine v. Great Western R. R. Co., 6 B. & S. 562; Witmore v. Story, 22 Barb. (N. Y.) 414; Com. v. Erie & N. E. R. R. Co., 27 Penn. St. 339. And the fact that the excess arises from a misapprehension of the power conferred is no excuse. Hudson R. R. Co. v. Arther, 6 Paige (N. Y.), 84; Sandford v. R. R. Co., 24 Penn. St. 378.

² Steele v. Western Inland Locks Navigation Co., 2 Johns. (N. Y.) 283. The Queen v. Bradford Canal Co., 6 B.

& S. 649; Delaware Canal Co. v. Com., 60 Penn. St. 367.

³ Rex v. Pease, 4 B. & Ad. 30; Lawrence v. R. R. Co., 16 Q. B. 642; Regina v. Charlesworth, id. 1010; Abraham et al. v. The Great Northern Railway, id. 584.

⁴ People v. Manhattan Gas Co., 64 Barb. (N. Y.) 55; Carhart v. Auburn Gas-light Co., 22 id. 297; Cleaveland v. Citizens Gas-light Co., 20 N. J. 201; Fletcher v. R. R. Co., 25 Wend. (N. Y.) 462; First Baptist Church v. R. R. Co., 5 Barb. (N. Y.) 79; State v. Western Inland Locks Navigation Co., 2 Johns. (N. Y.) 283; R. R. Co. v. Applegate, 8 Dana. (Ky.), 287; Spencer v. London & Birmingham R. R. Co., 8 Sim. 183; Walker v. Board of Public Works, 16 Ohio St. 540; Manhattan Gas Co. v. Barker, 36 How. Pr. (N. Y.) 233. In Crittenden v. Wilson, 5 Cow. (N. Y.) 165, SUTHERLAND, J., said: "The effect of the grant is simply to authorize the defendant to erect his dam as he might have done if the stream had been his

SEC. 751. The legislature may authorize a use of property that will operate to produce a public nuisance, but it cannot authorize a use of it that will create a private nuisance by an actual invasion of one's premises by noxious vapors, malarial gases or disagreeable smells, without compensation therefor.¹ The right

own, without the grant. *The dam could not be indicted as a public nuisance and abated. The only remedy for those injured is by action.*" *People v. Platt*, 17 Johns. (N. Y.) 195; *Brown v. Cayuga R. R. Co.*, 12 N. Y. 487; *Lawrence v. R. R. Co.*, 19 Q. B. 643; *Robinson v. N. Y. & Erie R. R. Co.*, 27 Barb. (N. Y.) 512; *Bradley v. N. Y. & N. H. R. R. Co.*, 21 Conn. 305; *Mahan v. R. R. Co.*, *Lalor's Supp.* 156; *Williams v. N. Y. Central R. R. Co.*, 16 N. Y. 97; *Lyman v. White River Br. Co.*, 2 Aiken (Vt.) 255; *Carpenter v. Horse R. R. Co.*, 11 Abb. Pr. N. Y. (N. S.) 416; *Tinsman v. Belvidere R. R. Co.*, 2 Dutcher (N. J.) 148; *Eastman v. Company*, 44 N. H. 143; *Lee v. Pembroke Iron Co.*, 57 Me. 481; *Nevins v. Peoria*, 6 Am. Rep. 41 Ill. 502; *Richardson v. Vermont Central R. R. Co.*, 25 Vt.; *March v. R. R. Co.*, 19 N. H. 372; *Estabrook v. R. R. Co.*, 12 Cush. (Mass.) 224; *Wilson v. City of New Bedford*, 108 Mass. 261; 11 Am. Rep. 352; *Phinney v. Augusta*, 47 Ga. 263; *Curtis v. R. R. Co.*, 14 Allen (Mass.), 55; *Morgan v. King*, 35 N. Y. 340; *Hinchman v. Patterson Horse R. R.*, 17 N. J. 75; *Louisville v. Rolling Mill Co.*, 3 Bush (Ky.), 416; *People v. Law*, 34 Barb. (N. Y.) 294; *Dela-ware & Raritan Canal Co. v. Wright*, 1 N. J. 469; *People v. Kerr*, 38 Barb. (N. Y.) 357; *Rickett v. Metropolitan R. R. Co.*, 2 H. L. Cas. 175; *Biscar v. Great Eastern R. R.*, 16 L. R. (Eq. Cas.) 640; *Hamden v. N. H. R. R. Co.*, 27 Conn. 158; *North Staffordshire R. R. Co. v. Dale*, 8 E. & B. 836; *Estabrook v. Peterborough R. R. Co.*, 12 Cush. (Mass.) 224; *Regina v. Train*, 2 B. & S. 640; *Eagle v. Charing Cross R. R. Co.*, 2 L. R. (C. P.) 638; *Johnson v. Atlantic R. R. Co.*, 38 N. H. 569; *Eaton v. Boston & Concord R. R. Co.*, 51 id. 504; 12 Am. Rep. 147; *Alton, etc., R. R. Co. v. Deitz*, 50 Ill. 210. In *Tinsman v. The Delaware & Belvidere R. R. Co.*, 2 Dutcher (N. J.), 148, the court places the liability of railroad companies or other companies acting under legislative authority upon

the same footing with individuals using their own premises for a similar purpose. "The grantee of a franchise for private emolument, as a railroad company," says the court, "may be vested with the sovereign power to take private property for public use, on making compensation, but is not clothed with the sovereign's immunity from resulting damages. This power leaves their common-law liability for injuries done in the exercise of their authority precisely where it would have stood if the land had never been acquired in the ordinary way." In this case the plaintiff was held entitled to recover for injuries sustained by him, by reason of being deprived of free access to an eddy and creek's mouth, in which he had the right to store lumber, and the court held that the fact that the creek was navigable and the legislature had the right to control it was no defense to the action. In *Robinson v. N. Y. & Erie R. R. Co.*, 27 Barb. (N. Y.) 512, the court held that a legislative grant to construct a railroad can give no authority to invade any private rights without just compensation. It confers a franchise simply and the title and rights of a private corporation, but no exemption for wrongs to private property. That if it so excavates and removes the banks of a stream as to cause it to overflow it is liable for all the injuries that ensue, and that as to them, in all respects, the same rule of liability exists as against an individual doing the same acts upon his own land. It is liable for injuries resulting from diverting a river, *Cott v. Lewiston*, 36 N. Y. 214, and for injury resulting from the occupancy of a public street in front of one's premises, of which he is the owner of the fee, *Fletcher v. R. R. Co.*, 25 Wend. (N. Y.) 462; *Trustees v. R. R. Co.*, 3 Hill (N. Y.), 367; or for shutting off access to other parts of one's premises, *Miller v. Auburn, etc., R. R. Co.*, 6 Hill (N. Y.), 61.

¹ *Stone v. F. P. & N. W. R. R. Co.*, Am. Law Times, vol. 2, p. 54.

given, however, in order to warrant the erection of a public nuisance must be clearly within the scope of the grant, and must fairly be within the contemplation of the legislature in conferring the power. This question was ably discussed in *Queen v. Bradford Navigation Co.*, 6 Best & Smith, 649, which has been previously referred to in this chapter. In that case CROMPTON, J., said: "It is conceded that we are not to consider the case as against the company. The indictment charges the defendants with a public nuisance by collecting and keeping exposed in their canal, foul and polluted water. It is clear that they did take and collect the water of the Bradford beck and bring it into the head of their canal, so that filth and mud were collected there, and an undoubted nuisance caused. The foul water was more stagnant in the canal than it would have been in the beck, and the defendants are liable unless they are authorized by some statute to create this nuisance. The lessees may justify, as the company might, under the powers of the act of parliament. But is there any provision in the act that the company may commit a nuisance? Whether an authority is given or duty imposed depends on the intention of the legislature. Here the company are authorized to take the water of certain becks and make a canal, but that does not involve their bringing feculent matter and allowing it to accumulate in their canal so as to be a nuisance.

The only question is whether the present case is within the authority of *Rex v. Pease*, 4 B. & Ad. 30. There the legislature must have intended to authorize the nuisance which was the subject of the indictment, and the judgment proceeded on that ground. In the argument of that case, page 36, the observation of PARKE, J., in *Rex v. Sir John Morris*, 1 B. & Ad. 441, on a local act which enabled proprietors of lands, etc., to make railways through such lands and across and along any roads to communicate with another railway, was cited; he said, pages 449, 450: "Supposing the 70th section" of the act "to be taken alone, it must at least be understood with the limitation, that where a railway is laid upon another road, sufficient space be left independently of it for the public to pass." Therefore, *prima facie*, some nuisance was intended. And in *Rex v. Pease*, the same learned judge, in delivering the judgment of the court, after referring to

the clause of the special act, said, pages 41, 42: "The legislature therefore must be presumed to have known that the railroad would be adjacent for a mile to the public highway, and consequently that travelers upon the highway would be, in all probability, incommoded by the passage of locomotive engines along the railroad. That being presumed, there is nothing unreasonable or inconsistent in supposing that the legislature intended that the part of the public which should use the highway, should sustain some inconvenience for the sake of the greater good to be obtained by other parts of the public, in the more speedy traveling and conveyance of merchandise along the new railroad."

It is agreed on both sides in the present case that a new state of things, which the legislature never intended or contemplated, has arisen; and, therefore, the present case is not within *Rex v. Pease*.

The only way in which such a nuisance as this can be legitimated, is by showing that the legislature intended to legitimate it.

Here, power was given to the company to take the water of certain becks; but not to take the water at all times so as to cause pollution of the atmosphere and cause disease. Power was also given, which they have not used, to make reservoirs for supplying their canal with water. It is not found that it was necessary for the purposes of the canal that they should make this nuisance, or that they should take the water of the Bradford beck."

SHEE, J. "It is admitted that the canal in its present state is a nuisance; and the question is, whether the act of parliament under which it was authorized to be made exempts the lessees from the legal consequences of having created a nuisance. Assuming the act authorized the company to take the water of the Bradford beck, it was, at the time the act passed, sufficiently pure not to be a nuisance when collected, and the authority to take it in its then state is no authority for taking it in such a state as that; when collected in a stagnant form, it becomes a nuisance. *Rex v. Pease* is distinguishable; there the act of par-

¹ *Lawrence v. The Great Northern Railway Company*, 16 Q. B. 643. See *Com. v. Reed*, 34 Penn. St. 375; *Delaware and Canal Co. v. Com.*, 60 Penn. St. 367, where a similar doctrine was held, when the defendant

purchased a canal of the State, and maintained its banks in such a manner that the water escaped, and gathering in eddies, became stagnant and emitted noxious smells.

liament authorized the nuisance, viz.: the use of locomotive steam engines in the way and the place in which, and where, their use was a nuisance. But if a new mode of using locomotive engines had been afterward discovered, producing effects different and much more injurious to the public than the effect of engines constructed and worked at the time when the act passed, that would be a nuisance not within the contemplation of the legislature, and not authorized by the act."

SEC. 752. In those States where there are no constitutional restrictions imposed upon the legislature, against the taking of private property for public purposes without compensation, the power of the legislature is of course unlimited and supreme, and it may impose such burdens upon private rights without compensation, as it pleases, for the public good; but where, as is the case in nearly all the States, the right is restricted by requiring compensation, the legislature cannot confer upon a corporation the right to do any act that imposes a burden upon the property of others that amounts to an actual *taking* of property for public purposes, so as to exempt such corporation from liability for all damages that result from the exercise of their franchise that, in law, amounts to a taking of property. Thus it has been held that a legislative grant did not exempt gas companies from liability for damages resulting from noxious smells emitted from their works,¹ or from damages resulting from the pollution of the water of a stream by turning its refuse matter therein,² or an individual or corporation from damages arising from the obstruction of a navigable stream,³ or from excavating lands so as to let down adjoining soil,⁴ or so as to injure adjacent houses,⁵ or making erections that hide the ancient lights of another;⁶ setting back the water of a stream upon the lands of adjoining owners;⁷ turning surface water upon another's premises;⁸ diverting the water of a stream;⁹

¹ *People v. Manhattan Gas-light Co.*, 64 Barb. (N. Y.) 55.

² *Carhart v. Auburn Gas-light Co.*, 22 id. 297.

³ *Jolly v. Terre Haute Draw Bridge Co.*, 6 McLean (U. S.).

⁴ *Richardson v. Vermont Central R. Co.*, 25 Vt. 465.

⁵ *Biscoe v. Great Eastern Railway*, 16 L. R. Eq. Cas. 640.

⁶ *Eagle v. Charing Cross R. R. Co.*, 2 L. R. (C. P.) 638.

⁷ *Lawrence v. The Great Northern R. R. Co.*, 16 Q. B. 642.

⁸ *Waterman v. Vermont Central R. Co.*, 30 Vt. 61; *Estabrook v. Peterborough*, 12 Cush. (Mass.) 224.

⁹ *Cott v. Lewiston*, 35 N. Y. 214; *Hatch v. Vermont Central R. R. Co.*, 25 Vt. 49.

causing water to rise in a stream by erection of embankments, so as to percolate into another's cellars, or so as to cut off the drainage of lands; ' flooding the lands of another by cutting through an embankment that confines a stream within its proper banks ; ' by erecting embankments that cut off access to a public street ; ' or the cutting off of access to a navigable stream where a right of access has been acquired and is annexed to an estate as an easement ; ' by the casting of rocks upon adjacent lands in the process of blasting for the road-bed of a railroad, and leaving them upon the land ; ' injury from noise, by erection of workshops near dwellings and places of business, disturbing the comfortable enjoyment thereof, and injuring property by varying agitating noises and motions ; ' by erecting embankments so as to prevent escape of surface water from adjacent lands, without proper culverts, where they can be conveniently made, ' and thus, generally, it may be said, that a legislative grant furnishes no immunity from liability for damages caused by the exercise of the franchise, that amounts to the taking of property within the legal interpretation of the term, and that this applies to the taking of an easement or any interest in land, even less than a fee. ⁸

SEC. 753. It by no means follows that all consequential injuries resulting from a public work are the subject of an action, on the ground of nuisance, for, when the act is lawfully exercised in a lawful way, no liability exists for resulting damages, unless the injury results from what might fairly be said to amount to an actual taking of property. ⁹ REDFIELD, J., in the case of *Hatch v. Vermont Central R. R. Co.*, 25 Vt. 67, very ably discusses this

¹ *Wilson v. New Bedford*, 108 Mass. 261.

² *Del. & Raritan Canal Co. v. See*, 2 Zab. (N. J.) 243; *Eaton v. Boston, Concord & Montreal R. R. Co.*, 51 N. H. 504; 12 Am. Rep. 147; *Lawrence v. The Great Northern R. R. Co.*, 16 Q. B. 642.

³ *Wetmore v. Story*, 22 Barb. (N. Y.) 414; *Wood v. Stourbridge*, 16 C. B. (N. S.) 222; *Chamberlain v. West End R. R. Co.*, 2 B. & S. 605; *Drake v. Hudson B. R. R. Co.*, 7 Barb. (N. Y.) 508; *Spencer v. London & Birmingham R. R. Co.*, 8 Sim. 183.

⁴ *Duke of Buccleugh v. Metropolitan Board of Works*, 5 H. L. Cas. 405.

⁵ *Sabin v. Vermont Central R. R. Co.*, 25 Vt. 368.

⁶ *Mumford v. Wolverhampton, etc.*, 1 H. & N. 34; *Cooper v. North British R. R. Co.*, 35 Juris. 295; 1 Macph. (Sc.) 497.

⁷ *Johnson v. Atlantic, etc., R. R. Co.*, 35 N. H. 569.

⁸ REDFIELD, J., in *Hatch v. Vermont Central R. R. Co.*, 25 Vt. 66.

⁹ See *Cameron v. Charing Cross R. Co.*, 19 C. B. 764.

question, and announces a doctrine substantially in consonance with this. In that case the plaintiff sought to recover for consequential injuries arising from the construction of the defendant's railroad in the village of Burlington upon the ground that the excavations and embankments made by the defendants in the necessary construction of their road, prevented the free escape of surface water arising from rains and the melting of snow, from the streets, so that it was sent into his store and upon his premises to his damage, and whereby his premises were rendered less accessible from the street; that before the erection of the plaintiff's road, people could safely hitch their horses in front of his premises, and that he could safely drive to and from his premises with horses and carriages. The court held that the plaintiff was not entitled to recover the damages ensuing from these acts of the company, upon the ground that, even if the acts had been done by an individual clothed with no special powers from the State, it would not have created an actionable injury. The work done was lawful. It was performed prudently and "with as little injury as possible to the plaintiff's property consistently," etc. The learned judge said: "In the absence of all statutory provisions to that effect, no case, and certainly no principle, seems to justify the subjecting a person, either *natural* or artificial, in the prudent pursuit of his own lawful business, to the payment of consequential damages to other persons in their property or business. This always happens more or less in all rival pursuits, and often, where there is nothing of that kind, one mill or one store or school injures another. One's dwelling is undermined or its lights darkened, or its prospect obscured and thus materially lessened in value, by the erection of buildings upon the lands of other proprietors. One is beset with noise or dust or other inconvenience, by the alteration of a street or more especially by the introduction of a railway, but there is no redress in any of these cases. The thing is lawful in the railroad as much as in the other cases supposed." In the same opinion the court disposes of a question between one Whitcomb and the same defendant, for injuries resulting from a neglect of the defendant to build a proper sluice or culvert for the passage of a stream of water whereby the plaintiff's lands were injured. For the neglect

of the defendant to erect such a culvert as was necessary and sufficient for that purpose, the court held that the defendant was clearly liable both at common law and under the provisions of its charter.

SEC. 754. The conferring of special privileges upon an individual or corporation to exercise a particular franchise, is always upon the implied understanding that the franchise shall be prudently exercised and in such a manner as to inflict the least injury upon others. It is upon this principle that it is held that where there are two modes of exercising the right, by one of which it would be a nuisance to others, and by the other of which it would not, that the method by which the nuisance would be avoided must be adopted. Corporations are given large latitude for the exercise of a reasonable discretion in the prosecution of their work, but they are subject to the supervision of the courts; and if they abuse this discretion and exercise it in a careless or unreasonable manner, redress may be had for damages resulting therefrom either at law or in equity.¹ Damages that result from a careless or unreasonable exercise of their powers, are not treated as covered by the franchise, or as having been contemplated by the act conferring the authority; consequently a land owner whose land has been taken under the grant, and whose damages have been appraised and paid, is not thereby debarred of a remedy for damages arising from such a course, whereas he would be if the damages arose from a prudent and reasonable exercise of the powers conferred. Such damages are not regarded as covered by the appraisal or award, and may be recovered by him, as well as by one whose land has not been taken, as all such acts are regarded as being *ultra vires* and not protected by the grant.² The real test is really this; all the natural and probable consequences of the exercise of the power given may be said to have been within

¹ Whitcomb v. Vermont Central R. R. Co., 25 Vt. 69; Regina v. Scott, 3 Ad. & El. 543.

² Eaton v. Boston, Concord & Maine R. R. Co., 51 N. H. 504; 12 Am. Rep. 147; Baltimore and Potomac R. R. Co. v. Magruder, 34 Md. 79; 6 Am. Rep. 311; Cooper v. N. British R. R. Co., 27

Jur. 241; Fletcher v. R. R. Co., 25 Wend. (N. Y.) 462; State v. Stoughton, 5 Wis. 291; People v. Law, 34 Barb. (N. Y.) 494; Hinchman v. R. R. Co., 17 N. J. 75; Potter's Dwarries on Statutes, 75; First Baptist Church v. R. R. Co., 5 Barb. (N. Y.) 79; Steele v. Western Inland Nav. Co., 2 Johns. (N. Y.) 283.

the contemplation of the grant, but those results which are a *possible*, but not the necessary result thereof, are *not* covered by the grant, and liability exists therefor as much as though the legislative power had never been given.

SEC. 755. In determining the scope and powers of an individual or corporation under a legislative grant, reference must always of course be had to the language of the grant, to ascertain the nature and extent of the powers granted, as well as the intent of the legislature. There can be no question that the legislature has full and ample power to exempt from liability for injuries that do not operate as an actual taking of property within the letter and spirit of constitutional provisions. It may not always be easy to determine what really amounts to a taking of property, but it is safe to say that, whenever the exercise of the right operates to destroy an easement incident to real property,¹ or amounts to an actual physical invasion of property by some agency that produces injury thereto, or imposes a burden thereon, that this is a taking of property. There need not be an exclusive appropriation of the property, but such an interference with the beneficial use thereof as operates an essential abridgment of the owner's rights incident to, and an essential part of, the estate.² There can be no question that the erection of gas works, or the setting up of any other noxious trade in the vicinity of my premises, that emits noxious odors, which are sent over my lands in quantity and volume, sufficient to essentially interfere with the use of that air for the ordinary purposes of breath and life, so as to constitute a legal nuisance, is such a taking of my property as the legislature may not permit without compensation. What possible distinction can there be between the actual taking of my property, or a part of it, and occupying it for the erection of a railroad track or a gas house, and invading it by an agency that

¹ *Duke of Buccleugh, v. Metropolitan Board of Works*, 5 H. L. 418; *Chapman v. Oshkosh R. R. Co.*, Wis.

² *Nevins v. Peoria*, 41 Ill. 502; 6 Am. Rep. 196; *People v. Kerr*, 37 Barb. (N. Y.) 257; *Wynehamer v. The People*, 13 N. Y. 378. See *Eaton v. Boston, Concord & Montreal R. R. Co.*, 51 N. H.; 12 Am. Rep. 147, in which SMITH,

J., ably discusses this question and reviews the principal authorities bearing upon the question—an opinion worthy of careful study. He says: "The principle must be the same whether the owner is wholly deprived of the use of his land or only partially deprived of it."

operates as an actual abridgment of its beneficial use, and possibly a complete and practical ouster. There certainly can be none. By the erection of such works a burden is imposed upon my property; the property itself is actually invaded by an invisible, yet a pernicious agency, that seriously impairs its use and enjoyment, as well as its value. The impregnation of the atmosphere with noxious mixtures that pass over my land is an invasion of a natural right, a right incident to the land itself, and essential to its beneficial enjoyment. My right to pure air is the same as my right to pure water; it is an incident of the land, annexed to and a part of it, and it is as sacred as my right to the land itself.¹ Therefore, I apprehend that the legislature has no power to shield one from liability for all the consequences of the exercise of an occupation that produces such results any more than it has to authorize the flooding of my lands or the permanent diversion of a stream.²

SEC. 756. In England the power of parliament is omnipotent. It is not restricted in the exercise of its discretion in reference to the taking of private property for public purposes, as our State legislatures are; but it is provided by law that compensation shall be made for all lands taken, and for all "injuriously affected." Under this statute the courts hold that no liability exists except in respect to damages which would have been the ground of an action if the act occasioning it had been done without the authority of the statute.³ Therefore, the decision of the English courts upon questions of this character are not always applicable to cases arising here, where the legislature is surrounded with constitutional checks and provisions circumscribing and limiting its power.

¹ *Salvin v. North Brancepeth Coal Co.*, 31 L. T. (N. S.) 156.

² *People v. Manhattan Gas-light Co.*, 64 Barb. (N. Y.) 55; *Carhart v. Auburn Gas-light Co.*, 22 id. 297; *Crittenden v. Wilson*, 2 Cow. (N. Y.) 163; *In Pentland v. Henderson*, 17 D. 542, it was held that even though the defendant had a license for the prosecution of his trade in the locality complained of this did not protect him from liability if his slaughter-house became a

nuisance. *Broadbent v. Imperial Gas Co.*, 7 D. M. & G. 450.

In *Bamford v. Turnley*, 3 B. & S. 62, it was held that that is a bad law, which, for public benefit, inflicts loss upon a citizen without compensation. *Cooper v. North British R. R. Co.*, 1 Macph. (Sc.) 499; *Mumford v. Wolverhampton*, id.

³ *Regina v. Metropolitan Board of Works*, 3 B. & S. 710; *New River Co. v. Johnson*, 2 E. & E. 435.

SEC. 757. For injuries that are purely consequential and are the result of an act done within the scope of the power granted, and that arise from a proper and necessary exercise of the power given, and that can in no sense amount to an actual invasion or taking of property, no remedy can be had. But for consequential injuries resulting from an excess of power, or from an exercise of its powers in an improper or careless or negligent manner, a remedy may be had. The act only operates as a defense when the consequences are fairly within the contemplation of the legislature, to be gathered from the grant, and the nature of the powers granted, and the location to which it is applicable.¹ Where a person whose lands have been taken under legislative authority, whose damages have been appraised, sustains special damage from the exercise of the power on his soil, his damages are treated as covered by the appraisal, unless they arise from an excess of power, or from a careless or improper execution of the powers conferred.¹ But for injuries resulting from the use of the premises of another, a recovery may be had, and the award of damages does not cover the same.²

¹Attorney-General v. Birmingham, 4 K. & J. 528; Johnston v. Providence R. R. Co., 10 R. I. 365; Merrifield v. Worcester, 110 Mass. 216; State v. Parrott, 71 N. C. 311; Harris v. Thompson, 9 Barb. (N. Y.) 360; Steele v. Inland Locks, 2 Johns. (id.) 283; R. R. Co. v. Applegate, 8 Dana (Ky.) 289; Rex v. Morris, 1 Brad. (N. S.) 441; Bridge Co. v. R. R. Co., 6 Paige's Ch. (N. Y.) 554; Hamilton v. R. R. Co., 9 id. 171; Bloodgood v. R. R. Co., 18 Wend. (N. Y.) 1; People v. R. & S. R. R. Co.,

15 id. 113; Fletcher v. R. R. Co., 25 id. 462; Canal Co. v. R. R. Co., 9 Paige (N. Y.), 323; Crittenden v. Wilson, 5 Cow. (N. Y.) 165; Brown v. Cayuga R. R., 12 N. Y. 487; Attorney-General v. Met. Bd. of Works, 1 H. & M. 320; Ware v. Regents Canal Co., 3 D. & J. 227; Coats v. Clarence R. R. Co., 1 R. & M. 181; Stainton v. Woolrych, 23 Beav. 234; Imperial Gas Co. v. Broadbent, 7 D. M. & G. 459.

²Eaton v. Boston S. R. R. Co., 51 N. H. 504; 12 Am. Rep. 147.

CHAPTER TWENTY-FOURTH.

DANGEROUS ANIMALS.

SEC. 758. Animals *ferae naturae*, keeping of.

759. Domestic animals, liability for injuries by.

760. Proof of scienter.

761. Right to keep watch dogs.

762. Degree of care required in keeping vicious animals after notice.

763. When animals are nuisances.

764. Rabid dogs, etc.

765. Who is liable for injuries from.

766. Animals disturbing neighborhood at night.

767. Obstructing public or private way by keeping ferocious animals near.

SEC. 758. Any person who keeps an animal *ferae naturae*, of a ferocious or mischievous nature, is bound to keep it from doing injury to others, at his peril, and is liable for all the consequences, if it escapes and commits injury, either to the person or property of others. If the animal is of a *ferocious* nature and liable to attack or injure mankind, its negligent keeping, or the keeping of it at all, in a place or situation where it may do injury to people, renders the owner or keeper liable to indictment as for a public nuisance. In reference to this class of animals a recovery can be had, without proving that they ever have bitten or attacked mankind, as every person is presumed to be cognizant of their ferocious nature. Negligence need not be alleged or proved as the *gist* of the action is the keeping.¹

SEC. 759. In reference to domestic animals the rule is, that if any person keeps an animal *mansuetae naturae*, of a ferocious or mischievous disposition, accustomed to bite or attack mankind, or to bite and injure other domestic animals, *knowing* that it is possessed of this disposition, he is bound to restrain it at his peril, and if it escapes and injures another,¹ either in his person or property, he will be liable for all the damages that ensue, and

¹ May v. Burdett, 9 Ad. & El. (Q. B.) 1574, 1583; 1 Hale's P. C. 430; 4 Burn's 101; 16 L. J. (Q. B.) 64; Buller's Nisi Justice, 578; Colby's Criminal Law; Prius, 77; Rex v. Higgins, 2 Ld. Rayd. Roscoe's Criminal Evidence, 745.

that, too, even though no negligence can be predicated of the keeping.¹ In such a case the *gist* of the action is the *keeping*, after knowledge of its vicious propensities,² and he is liable, even though the injury results from the carelessness of the person

¹ *May v. Burdett*, 9 Ad. & El. (Q. B.) 101; *Partlow v. Haggarty*, 35 Ind. 178; *Kelly v. Tilton*, 2 Abb. Ct. App. (N.Y.) 495; *Laverone v. Mangianti*, 44 Cal. 138; *Kertschacke v. Ludwig*, 28 Wis. 430. In *Jenkins v. Turner*, 1 Ld. Rayd. 110, it was held that there was a "difference between things *ferae naturae*, as lions, bears, etc., which a man must keep up at his peril, and beasts that are *mansuetae naturae*, and break through the tameness of their nature. In the latter case the owner must have notice; in the former an action lies against the owner without notice." Buller's *Nisi Prius*, 77. In *Laverone v. Mangianti*, 44 Cal. 138, the court says that the owner of a ferocious dog, knowing its vicious propensities, keeps it at his own risk and is responsible for any injury inflicted by it upon a person free from fault. There is no question but that a man may lawfully keep a ferocious dog, and he has the same right to keep a tiger, but he is bound to keep them so that they shall do no injury. The only difference between the two is, that as to the tiger he is answerable without notice of its vicious propensities, while as to the dog, notice or knowledge is required. This knowledge may be established by evidence or presumption, and in the one case or the other is the same in substance, and works the same results. See, also, *Kertschacke v. Ludwig*, 28 Wis. 430; Lord HALE, in his *Pleas of the Crown*, Vol. 1, p. 430, puts the liability of the owners of animals upon this ground, "If a man have a beast, as a bull, cow, horse or dog, used to hurt people, if the owner knows not his quality he is not punishable. These things seem to be agreeable to the law: 1st. If the owner have notice of the quality of his beast, and it doth any body hurt, he is chargeable with an action for it. 2d. Though he have no particular notice that he did any such thing before, yet if it be a beast that is *ferae naturae*, as a lion, a bear, a wolf, yea, an ape or monkey, if he get loose and do harm to any person, the owner is liable to an action for the

damage, and so I knew it to be adjudged in Andrew Baker's case, whose child was bit by a monkey that broke his chain and got loose. 3d. And, therefore, in case of such a wild beast, or in case of a bull, or cow, that doth damage, where the owner knows of it he must, at his own peril, keep him up safe from doing hurt, for though he use his diligence to keep him up, if he escape and do harm, the owner is liable in damages." The rule is in reference to all animals, whether *ferae naturae* or *mansuetae naturae*, that the owner or keeper is presumed to know their natural disposition and instincts, and for all injuries resulting from their natural instincts, or that which their own nature impels them to do, their owner is liable without notice. Thus as it is the nature of cattle to roam, the owner is liable for the trespasses they do, even though he knew not that they had ever trespassed before, and the same rule applies in reference to all classes of animals. Thus, if a man knows that his bull will run at men who wear red handkerchiefs, if he drives the bull along the street and a man wearing a red handkerchief is injured by the bull, he is liable therefor, on his knowledge of the bull's peculiarity; *Hudson v. Roberts*, 6 Excheq. 697; *Van Leuven v. Lyke*, 1 N. Y. 515; *Stumps v. Kelley*, 22 Ill. 140; *Jackson v. Smithson*, 15 M. & W. 563, and this is the rule of the Roman law. See Wharton on Negligence, p. 999.

² In *Smith v. Pelah*, 2 Strange, 1,264, the defendant kept a ferocious dog, knowing that he was accustomed to bite mankind, and suffered him to run at large, and to lie at his door. The plaintiff, on entering the defendant's house, stepped upon the dog's toes, and was bitten. LEB, C. J., said the injury "was owing to his not hanging the dog when he first had notice, and the safety of the king's subjects ought not afterward to be endangered. The *scienter* is the *gist* of the action." In *Buxentine v. Sharp*, 3 Salk. 13, the defendant kept a bull accustomed to fly at men. The plaintiff was in-

jured by the bull, and alleged in his declaration that the bull was "accustomed to run at men," but did not allege that the defendant *knew* of its propensity to do so. The plaintiff had a verdict, but it was set aside, the court refusing to presume that it was proved that the defendant knew the vicious qualities of his bull, when such knowledge was not alleged. *Satchet v. Eltham*, Freem. (K. B.) 534; *Michael v. Alstree*, 1 Lev. 172; *Mason v. Keeling*, 12 Mod. 352; *Thomas v. Morgan*, 2 M. & K. 496.

In *May v. Burdett*, 9 Q. B. 101, the plaintiff's wife was injured by a monkey belonging to and kept by the defendant. The declaration contained an allegation of the vicious propensities of the monkey, and that the same were *known* by the defendant; but did not allege that the monkey was negligently kept. After verdict for the plaintiff, it was moved in arrest of judgment for this cause. But the motion was denied, Lord DENMAN, C. J., saying: "The conclusion to be drawn from all the authorities is, that the person who keeps a mischievous animal, with knowledge of its propensities, is bound to keep it secure at *his peril*, and that if it does mischief, negligence is presumed without express averment. *The negligence is in keeping such an animal after notice.*" *Jenkins v. Turner*, 1 Ld. Rayd. 109; *Anonymous*, 1 Dyer, 25 b, pl. 162; 1 Viner's Abr. 234, Action.

In 1 Dyer, 162, 25 b, it is said that "in evidence to an inquest it was agreed by FITZHERBERT and SHELLEY that if a man have a dog which has killed sheep, the master of the dog being ignorant of such quality and property of the dog, the master shall not be punished for *that* killing. Otherwise is it, if he have notice of the quality of the dog." In *Dogge v. Cooke*, at an assize (in the 24th Eliz.), before Lord ANDERSON, the plaintiff was driven to put in evidence that the dog was used to kill sheep.

In *Knight v. Cronet*, Noy. 10, the defendant was sued for injuries resulting from his "dogs chasing the plaintiff's sheep and pigs, and for the biting of the said dogs so that the pigs died. The jurors found that the defendant was not guilty except as to one sheep of the value of 5s. 8d, which was caused by his seryant's command. The jurors

being demanded whether the dogs had been accustomed to bite sheep, answered no, whereupon it was ordered that the plaintiff take nothing by his writ." See Bacon's Abr., Pleas B., 4 V. 346; 1 Viner's Abr., Actions, H., pl. 1; *Traverse, P.*, pl. 9; *Comyn's Digest*, Action, Case for Negligence, A., 5; *Buxendine v. Sharp*, 2 Salk. 662; 2 Saund. 97; *Jenkins v. Turner*, 2 Salk. 662; 1 Ld. Raym. 109; 1 Show. 539.

It is not enough to prove that the dog is of a fierce and savage disposition and usually tied up by the defendant, and that the defendant promised to make a pecuniary satisfaction to the plaintiff for the injury. The *scienter* must be established by proper proof. *Beck et ux. v. Dyson*, 4 Camp. 197.

In *Jackson v. Smithson*, 15 M. & W. 563, the plaintiff brought an action for injuries received from being butted by the defendant's ram. The plaintiff alleged that the defendant wrongfully kept said ram, well knowing that it was prone to attack mankind, but did not allege that it was negligently kept. The declaration was held sufficient on motion in arrest of judgment.

In *Card v. Case*, 12 Jur. 247, which was an action for injuries received from a vicious dog, the defendant alleged the vicious character of the dog and the *scienter*. Held sufficient; also, that a plea of not guilty put in issue the *scienter*. See also *Hogan v. Sharpe*, 7 Cr. P. 755; *Hudson v. Roberts*, L. J. Ex. 299.

In *Oakes v. Spaulding*, 40 Vt. 347, it was held that the owner of a ram accustomed to butt mankind, knowing of its propensities is bound to keep it secure, so as to prevent injury therefrom. In that case the ram was the property of two persons, and one of the owners took it from the other owner's premises in his absence, and without consultation with, or permission from him, and the injury was done while so on the premises of such joint owner. It was held that the joint owner from whose pasture it was taken was liable for the injuries done by the ram while in the other owner's pasture without restraint; he having given no directions to restrain the ram, or having been consulted in reference to its care or management. *Brown v. Carpe ter*, 26 Vt. 638.

injured,¹ or if in the day time, even though he was a trespasser,² or was upon the premises after having been warned of the danger from the dog, provided the person was bitten or injured, while lawfully upon the premises. There is no question but that a man may lawfully keep a dog for household protection, or *any* purpose that his tastes or inclinations may dictate, and if the dog has never been known by him to bite or attack mankind, or to bite or attack other domestic animals, he is not liable for the injuries resulting from an attack made by the dog upon either a man or domestic animals. The animal being *mansuetæ naturæ*, its keeping is lawful until its viciousness is brought to the knowledge of the owner, but after such notice, in the language of LEE, Ch. J., in *Smith v. Pelah*, 2 Str. 1,264, he is liable for all the injuries done by the dog, to man or beast, for "not hanging the dog when he first had notice."³

¹ *Smith v. Pelah*, 2 Strange, 1,264, where plaintiff stepped on the dogs' toes, *May v. Burdett*, 9 Ad. & El. (Q. B.) 101.

² *Loomis v. Terry*, 17 Wend. (N. Y.) 496; *Sharples v. Bartley*, 4 Sneed (Tenn.), 58. But I apprehend that the question of liability in such a case would depend upon the character of the trespass, and as to whether it was trivial, and such as is tolerated by a quasi custom, or whether it was a trespass that was wholly unwarranted.

³ In *Fleming v. Orr*, 2 Macq. (Sc.) 14, Lord COCKBURN said, in reference to an action for a dog worrying sheep: "Every dog is entitled to at least *one* worry," and the rule would seem to be the same in reference to its attacks upon mankind. Every dog seems to be entitled to one bite, and every bull to one gore at a man, before its owner or keeper can be made liable for the results of such "playful" tricks on the part of his beasts.

In reference to the necessity of proving a scienter. *Scribner v. Kelly*, 38 Barb. (N. Y.) 14; *Vrooman v. Sawyer*, 13 Johns. 339; *Van Leuven v. Lyke*, 1 N. Y. 515; *Steele v. Smith*, 8 E. D. Smith (N. Y. C. P.), 321.

In *Earle v. Van Alstyne*, 8 Barb. (N. Y.) 130, the defendant kept bees near the highway, where he had kept them

for several years without their having done any damage to those passing. The plaintiff, while passing with his horse, was attacked by them, and they fell upon his horse and stung it to death. The court held that the defendant could not be made chargeable unless he *knew* that they were accustomed to sting horses, or had such a propensity. *Wolfe v. Chalker*, 31 Conn. 121; *Stumps v. Kelly*, 22 Ill. 140; *Popplewell v. Pierce*, 10 Cush. (Mass.) 509; *Kittredge v. Elliott*, 16 N. H. 77; *Wheeler v. Brant*, 23 Barb. (N. Y.) 255; *Marsh v. Jones*, 21 Vt. 378. But *one* instance is enough. *Arnold v. Norton*, 25 Conn. 92; *Kittredge v. Elliott*, ante; *Ocoherham v. Nixon*, 11 Ired. (N. C.) 269. And that it attacks *any* kind of domestic animal. *Pickering v. Orange*, 2 Ill. 338. But this is hardly to be regarded as safe authority unless the rule is applied to its *natural* propensity. See authorities cited infra.

In *Van Leuven v. Lyke*, 1 N. Y. 515, where the defendant's swine escaped and injured the plaintiff's cow and calf, it was held that no recovery could be had without proof of the scienter.

And in *Tift v. Tift*, 4 Den. (N. Y.) 175, it was held that without proof of scienter no recovery could be had even where the dog was set upon the cattle by the defendant's minor child.

SEC. 760. The same rule applies to *all* domestic animals, as bulls,¹ rams,² cows,³ horses,⁴ jacks,⁵ or *any* animal that, although domestic, has developed vicious traits that render its keeping dangerous to the safety of mankind, or to other domestic animals.

SEC. 761. It is not necessary to show that the owner or keeper of a vicious dog or animal has seen the animal attack mankind; it is sufficient to show that its vicious qualities have in some manner been brought to his knowledge, so that he can fairly be said to have notice thereof. Thus, if the owner is aware that such animals, as a class, will attack a person wearing a particular color of clothing, or that it will attack certain kinds of domestic animals, this is evidence from which the jury may infer that the owner or keeper had knowledge of its vicious propensities. But evidence that he knew that it had attacked animals of one class, is not evidence from which knowledge may be inferred that it would attack animals of another class; nor is it evidence to show that he knew it would attack mankind. Nor is evidence that he knew that it had attacked a man, evidence that he knew that it

Where the *scienter* is alleged and proved, negligence is not an element, and need not be alleged or proved. *McCaskell v. Elliott*, 5 Strob. (S. C.) 196; *Wilkinson v. Parrott*, 32 Cal. 102; *Framwell v. Little*, 16 Ind. 251; *Dearth v. Baker*, 22 Wis. 73; *Logue v. Link*, 4 E. D. S. (N. Y. C. P.) 63; *Decker v. Gammon*, 44 Me. 322; *Pickering v. Orange*, 2 Ill. 492; *McManus v. Finan*, 4 Iowa, 283; *Smith v. Causey*, 22 Ala. 568.

But as to domestic animals whose natural propensities are known, the rule is that the owner is only bound to exercise ordinary care when their natural propensities only lead them to commit ordinary trespasses. *Meredith v. Read*, 26 Ind. 334; *Earle v. Van Alstyne*, 8 Barb. (N. Y.) 630. But if the owner of a dog, knowing its propensity to chase game, suffers it to go at large, he will be liable for its destruction of pheasants in a neighbor's woods, even though they are being reared under a domestic hen. *Read v. Edwards*, 17 C. B. (N. S.) 242.

¹ *Cockerham v. Nixon*, 11 Ired. (U.

S.) 269; *Earhart v. Youngblood*, 27 Penn. St. 427; *Hudson v. Roberts*, 6 Exchq. 699; *Buxentine v. Sharp*, 3 Salk. 13; *Blackman v. Simmons*, 3 C. & P. 138.

² *Jackson v. Smithson*, 15 M. & W. 563; *Oakes v. Spaulding*, 40 Vt. 347.

³ *Hewes v. McNamara*, 106 Mass. 281.

⁴ *Michael v. Alestree*, 1 Lev. 172; *Goodman v. Gay*, 15 Penn. St. 188. And it seems that in the case of a horse turned loose in the street the owner is liable if he injures another, even though it is merely done in a playful mood. *Dickson v. McCoy*, 39 N. Y. 401. And in such cases the *scienter* need not be alleged or proved, as the gist of the action is the *negligence* in allowing it to go at large in a public place. But see *Cox v. Burridge*, 13 C. B. (N. S.) 430, where it was held that the *scienter* must be alleged and proved. But this case has been the subject of much unfavorable comment, and is not authoritative.

⁵ *Williams v. Dixon*, 65 N. C. 437.

would attack a sheep; but such evidence is sufficient to show that he was aware of its vicious propensities, and is enough to make him chargeable with injuries inflicted by it, if he suffers it to go at large whereby injury is inflicted upon an individual, or another domestic animal within the scope of such special notice.

¹ In *Hudson v. Roberts*, 6 Exchq. 696, the plaintiff was injured while passing along the highway, wearing a red handkerchief around his neck, by being set upon by the defendant's bull, which the defendant, with other cattle, was driving along the street. The defendant said that it was the red handkerchief that caused him to do it, as he knew *a* bull would run at any thing red, or that *the* bull would do so. This was all the evidence there was to establish the *scienter*, and after verdict for the plaintiff a motion for a nonsuit was made, upon the ground that no *scienter* was proved. But the court held that whether the defendant said that he knew that *a* bull, or that *the* bull would run at any thing red, was immaterial, that *either* expression was some evidence to go to the jury that the defendant knew the vicious qualities of the bull.

In *Worth v. Gilling*, 2 L. R. (C. P.) 1, it was held that the plaintiff need not prove that the dog had actually bitten another person before it bit him, but that it was enough to show that the defendant knew that it had evinced a savage disposition by *attempting* to bite a person.

As to the liability of a railroad company for injuries to a passenger from a dog belonging to a stranger that comes to the station without fault of the company, see *Smith v. Great Eastern R. R. Co.*, 2 L. R. (C. P.) 4.

In *Hartley v. Harriman*, 2 B. & Ald. 620; 2 Starkie, 212, it was held that proof that the defendant knew that his dog had been accustomed to bite men did not establish knowledge on his part that it would bite sheep.

In *Jenkins v. Turner*, 3 Salk. 13, the declaration alleged that the defendant kept a boar which was accustomed to bite animals, and that he knew of this quality. After verdict it was objected that the declaration did not disclose a good cause of action, because it did not allege what *kind* of animals the boar

had been accustomed to bite. But the court said that it would be presumed that no evidence was given of the killing or biting of any animal but of such of which he had notice.

In *Read v. Edwards*, 17 C. B. 246, the defendant, knowing the propensity of his dog to catch game, was held to charge him with liability for the destruction of young pheasants, being reared by a domestic fowl.

In establishing the *scienter* evidence that the defendant has warned persons to beware of the dog lest he should be bitten, is evidence to go to the jury in support of the allegation that the dog is accustomed to bite mankind, and knowledge of the fact on the part of the defendant. *Judge v. Cox*, 1 Starkie, 285.

In *Buller's Nisi Prius*, 77, the author says: "If one knowingly keep a dog accustomed to bite sheep, and the dog bite a horse, it is actionable; because the owner, after the first mischief, ought to have destroyed or hindered him from doing any more." And he refers to *Jenkins v. Turner*, 1 Ld. Raym. 110, as authority. It is doubtful, however, whether the case referred to sustains his position, as the very ground of the motion for a nonsuit was, that the declaration did not disclose the *kind* of animals which the dog had been accustomed to bite, and the court upheld the verdict upon the presumption that the evidence disclosed the fact that it had been accustomed to attack animals of the *class named* in the declaration.

In *Sayres v. Walsh*, 12 Irish Law Rep. 434, which was an action for injuries to the plaintiff's mare by being bitten by the defendant's dog in the street, it was held that the declaration of the defendant that he was "sorry for what had happened, that the dog slipped out of the yard without his knowing it," was competent evidence of the *scienter*.

It is not enough to show that he knew that the animal was fierce, but it must also be shown that he was in some way aware that its vicious propensities led it to make attacks upon men, or animals of a particular class,¹ or the recovery must be predicated entirely upon the negligent keeping, and must be an injury in accordance with the nature and disposition of the animal.² The rule is, that for all injuries inflicted by an animal, in accordance with its natural instincts, the owner or keeper is liable without special knowledge, as every person is presumed to be aware of the natural instincts or habits of animals in his care or custody. Thus a person having a lion or bear is presumed to know that it is fierce by nature, and will attack men, or other animals, even though it never has done so. So, too, the owner of cattle is presumed to know that it is their nature to roam; therefore, if they escape upon the fields

¹ *Hudson v. Roberts*, 6 Excheq. 697; *Jenkins v. Turner*, 1 Ld. Rayd. 110.

² In *Judge v. Cox*, 1 Starkie, 285, it was held that knowledge of the fierce disposition of a domestic animal is not enough. There must be evidence of knowledge that it has attacked mankind. But in *Worth v. Gilling*, 2 L. R. (C. P.) 1, it is not necessary that it should actually have bitten a man. It is enough to show that he knows that it has sprung at them, and *attempted* to bite.

The question as to whether the defendant *knew* the vicious qualities of the animal is one of fact for the jury, *Campbell v. Brown*, 19 Penn. St. 359; and the burden of proof is upon the plaintiff. *Card v. Case*, 5 C. B. (N. S.) 622; *May v. Burdett*, 8 Ad. & El. (Q. B.) 101. The dog may be brought into court for the inspection of the jury, on the question of disposition. *Line v. Taylor*, 3 Fost. & Fin. 751. Knowledge of the owner's wife, or of his servants, may be sufficient to charge the defendant with knowledge. *Gladman v. Johnson*, 3 L. J. (C. P.) 153. See *Laverone v. Mangianti*, 41 Cal. 138; 10 Am. Rep. 269, and valuable note by the reporter. *Kelly v. Wade*, 12 Irish L. R. 424.

³ In *Michael v. Alestree*, 2 Lev. 172; 1 Ventris, 295, the defendant was sued for injuries sustained by the plaintiff from being kicked by a young horse,

which the defendant took into Lincoln's Inn Fields (a public place) for the purpose of breaking. No *scienter* was alleged. After verdict for the plaintiff, it was moved in arrest of judgment that the injury happened against the defendant's will, etc. But the court said: "It was the defendant's fault to bring a wild horse into a public place where mischief might *probably* be done. Lately in this court an action was brought against a butcher who had made an ox run from his stall and gored the plaintiff, and this was alleged in the declaration to be in default of penning him."

WYLDE, J., said: "If a man hath an unruly horse in his stable, and leaves open the stable-door, whereby the horse goes forth and does mischief, an action lies against the master." TWISDEN, J., said: "If one keeps a tame fox, which gets loose and grows wild, he that kept him before shall not answer for the damage the fox doth after he hath lost him, and he hath resumed his wild nature." See *Weaver v. Wand*, Hobart, 134, for the principle upon which liability is predicated in this species of actions.

Mr. Wharton in his excellent treatise upon the Law of Negligence, 923, lays down the doctrine that the *scienter* is to be presumed in all cases "where it is the owner's duty to know of the animal's viciousness." Of the correctness

of another and do damage, they are liable without knowledge of their ever having previously done so, but, when the animal does that which is inconsistent with its nature, no liability attaches,

of this proposition as a mere abstract proposition there can be no doubt; at least, as applicable to most of the agencies employed by men, from which mischief *may* result. This doctrine has time and again been advanced by the courts. But the learned author, in the whole range of authorities to which he has had access, has been unable to find any which sustains his position as applicable as a legal proposition to animals "*mansuetæ naturæ*." The doctrine of the courts in reference to mischief arising from this class of animals is predicated upon sound public policy, and for the protection of their owners. The law does *not* presume that a man knows the disposition of his animals to do mischief which is inconsistent with their domestic habits, and the cases are numerous where this proposition has time and again been advanced. All the presumptions are in favor of the owner, and the burden of overcoming them is with the party seeking to charge him with liability. The case of *Lynch v. Nurdin*, 1 Q. B. 36, in no measure sustains his position, neither does it advance a new doctrine. In that case the *gist* of the action was not the defendant's *knowledge* of the fact that his horse would run away, if left unattended in a public street, but his *negligence* in leaving his horse unattended there, when it is generally known that in the very nature of things it must do mischief if it took fright and ran away. The doctrine of that case is as old as the courts, and we find in the time of Charles the Second in 1688 a case where the owner of a horse was held chargeable for damages by reason of a man being kicked by it in a public place, where the owner was exercising it to accustom it to use. The court held in that case that the *gist* of the action was the defendant's *negligence*, and no *scienter* was alleged or proved. *Michael v. Alestree*, 1 Ventris, 295. No court has ever refused relief in damages to a party who sustained injuries under the circumstances set forth in *Lynch v. Nurdin*. *Worth v. Gilling*, 2 L. R. (C. P.) 1, is in no measure in support of the author's position. In that case it

was proven that the owner *knew* that the dog had *attempted* to bite people, and the court held that this was competent evidence to go to the jury upon the question of *scienter*. And in this the court took no new departure, but only followed in the line of authorities that had grown gray from their antiquity. It has never been held by the courts that actual proof that the owner of an animal had *seen* the animal attack men or domestic animals, was necessary in order to establish the *scienter*, but has always been left as a question of fact for the jury to find, from such facts and circumstances as had a tendency to prove knowledge. In one case the dog was brought into court that the jury might look at it and judge from its looks and appearances whether it was so vicious that its owner must have known of its viciousness. *Line v. Taylor*, 3 Fost & Fin. 731. In the case of *Knight v. Cronet*, Noy. 10, the jury found a verdict for the plaintiff of 5s. 4d, for injuries inflicted upon one sheep by the defendant's dogs, but, with all the evidence before it upon that point, the court inquired of the jury, if from the evidence they found that the defendant knew that his dogs would bite sheep, and being answered in the negative, the verdict was set aside. No instance is to be found where the courts have ever disturbed the finding of a jury upon the question of *scienter* in such cases, where there was any evidence to sustain it. The rule in that respect has been very liberal and consistent with the best interests of society. It will not do, on the one hand, to hold the owners of domestic animals to strict liability for all injuries inflicted by them upon man or beast, without any reference to the question of the owner's knowledge of the animal's vicious propensities, neither, on the other hand, will it do to screen them from liability where, by reason of its viciousness, it has become a nuisance, and dangerous to the safety of the people. The courts, with a nice regard to the rights of all, have established a doctrine which is commendable for its wisdom, and the evenness and the ex-

without proof or knowledge¹ of its propensity to do the particular act from which injury arose.²

SEC. 762. In reference to the right of a person to keep a ferocious dog to guard his property, it is held, and with much propriety, by some of the courts, that such keeping is not excusable, except in such instances as the person would be justified in setting a spring gun, or other dangerous device for the protection of his property, and that, as to all injuries done by it, except in such instances as injuries from a spring gun would be excusable, liability attaches.³

SEC. 763. It is held that the owner of a vicious animal, after notice of its having done an injury, is bound to secure it at all

actness of its justice. It is not necessary, as has been before stated, that the owner should have seen his animals bite, kick or gore either man or beast in order to charge him with liability for such injuries. The viciousness of the animal, the length of time that its vicious tendencies have existed, the situation of the owner or keeper in reference to the animal, are all proper elements to be considered by the jury, and are facts from which, without evidence of positive knowledge, knowledge may be found. Jurors seldom make mistakes in these cases, and the rule has never yet been found to operate harshly. Courts will be slow, as to domestic animals, to presume, from the mere fact that they are proved vicious, without other proof of the owner's relation to the animal, and his opportunity to know their habits, that the owner knew that the animal had become so vicious as to be a nuisance, and render its owner liable. The rule suggested by Mr. Wharton would serve to cure no evil, but would rather open the door to much more conflict than now exists, and would operate harshly in many instances; but practically, it is an element which jurors have a right to consider, and which they do consider in connection with the viciousness of the animal, the owner's relation to it, and his opportunity to know its habits and propensities.

¹ Van Leuven v. Lyke, 1 N. Y. 515; Stumps v. Kelly, 22 Ill. 140. See sec. 908, Wharton's Law of Negligence,

where the author gives the doctrine applicable to this class of injuries, and the reason for it.

² See authorities cited under sec. 76.

³ In Wolf v. Chalker, 31 Conn. 131, the court says: "A ferocious dog is a dangerous instrument for a protection, and placing him for that purpose can only be justified in cases where the placing of concealed instruments may be justified to prevent a felony. Nor can such use of him by the owner, under his personal direction, be justified, where a like degree of injury may not be inflicted lawfully by a different instrument."

In Brock v. Copeland, 1 Esp. 203, in a case where a carpenter kept a ferocious dog, which was kept shut up all day, but was let loose at night for the protection of the house and yard, which injured the plaintiff's foreman who went to the yard at night. It was held that no recovery could be had, because a man had a right to keep a dog to protect his house and yard. But it is evident from what Lord KENYON said in reference to the owner of the bull, that the ground upon which the action was held not to lie, was because the plaintiff was a trespasser in the yard, and knew that the dog was there, and its ferocious nature. A man cannot keep a dog even to watch his premises, knowing it to be ferocious, in a situation where it is liable to injure a person entering the premises upon lawful business.

events, and is liable to parties subsequently injured, if the mode he has adopted to secure it proves insufficient. But this can be reasonably extended only to such injuries as result to one who is lawfully on the owner's premises, and who is not a trespasser, and who has not, after being warned of the danger, contributed to the injury by his own recklessness and carelessness.¹ If a dog is secured by a chain near a path leading to its owner's house, this does not excuse the owner from liability if the chain is so long that the dog can reach and attack one going over the path, nor if the chain proves insufficient to confine the dog, even though it is being teased by a child.² But if the dog is kept in a kennel or yard, where a stranger has no right to go, and he

¹ In *Sarch v. Blackburn*, 4 C. & P. 300, the court held that a person cannot recover for damages for an injury received from the bite of a dog placed in a yard for the protection of out-houses, unless he had such reasonable and justifiable cause for being there as might be pleaded in an answer to an action for trespass; and it was held that he was lawfully there, the fact that there was notice in large letters on a board, warning persons to beware of the dog, would be no protection from liability. It was also held that, even though there were two entrances, by one of which he might have entered without injury, would make no difference. This decision of the court was predicated upon the doctrine of *Bird v. Holbrook*, 1 Moore & Payne, 607, which was a case where the defendant set a spring gun upon his premises, without notice of the fact, and the plaintiff entering the premises in pursuit of four of his fowls, came in contact with it, and was injured, and the court held that he was entitled to recover. But it is evident from the language of both cases that, if the plaintiff had had actual notice of the presence of the dog and of the spring gun, and of the extent of the danger in entering the premises, his entry would have been such contributory negligence as would have prevented a recovery. *Brook v. Copeland*, 1 Esp. 203; *Loomis v. Terry*, 17 Wend. 496; *Sheaty v. Bartley*, 4 Sneed (Tenn.), 5; *Curtis v. Mills*, 5 C. & P. 489; *Charlwood v. Greig*, 3 Car. & Kir 48.

² *Mann v. Reed*, 4 Allen (Mass.), 431. The principle upon which these decisions rest is, that ferocious animals liable to do injury to men or property are nuisances, and their keeping after notice of such knowledge is so wrongful, that the owner is held chargeable for any neglect to *keep the animal* so that it can do no damage to a person who, without essential fault, is injured thereby.

In *Jones v. Perry*, 2 Esp. 482, the defendant kept a dog reputed to have been bitten by a mad dog. He had it confined in his cellar by a rope or chain, but the rope or chain was so long as to admit of its going to the curb-stone on the opposite side of the street, if it should escape from the yard. On the day in question the dog broke through the wicker gate and escaped into the street and bit and lacerated the plaintiff's child so that it afterward died of hydrophobia. The action was upheld, and the fact that it was reputed that the dog had been bitten by a mad dog was allowed to be given in evidence. Lord KENYON said: "Report had said that the dog had been bitten by a mad dog, and it became the duty of the defendant to be very circumspect. Whether the dog was mad or not was a matter of suspicion. It is not sufficient to say 'I did use a certain precaution. He ought to have used such precaution as would have put it out of the power of the animal to do hurt.'" The same rule applies to a ferocious dog, known by its owner or

goes there knowing of the presence of the dog, and for no lawful purpose, and is injured, no liability can be predicated against the owner or keeper, any more than as though the injury had been inflicted by a lion, by one's entering the cage, for the owner is only bound to keep the animal so that it shall not escape from his premises or injure any one lawfully entering them.¹ But, if the dog should be kept in a yard upon his premises, with a gate opening into it from the street or an adjoining lot, and a person in seeking to enter his premises for a lawful purpose should inadvertently open the gate and be attacked, he would undoubtedly be liable, nor would a warning posted over the gate to beware of the dog excuse him, unless the person injured saw it and understood its purport.²

SEC. 764. Ferocious animals accustomed to bite, attack or injure mankind are regarded as nuisances, and any person injured thereby may kill them. But the right to kill them stands upon the same grounds as the right to abate any other nuisance, it cannot be done until it has actually become a nuisance to them either by committing an actual injury to his person or domestic animals, or is in a situation where injury will be inflicted if not prevented by force. It is not necessary that a man should wait until he is actually bitten by a dog, or until his sheep or cattle are actually

keeper to be accustomed to bite. *Mason v. Kuling*, 12 Mod. 332.

In *Curtis v. Mills*, 5 C. & P. 489, the defendant kept a fierce dog, knowing its propensity to bite mankind. He kept the dog chained in the yard, but any one going from the yard gate to the stables would be within reach of the dog, notwithstanding the chain. While the defendant was lawfully passing from the gate to the stable the dog sprang at and bit him. The plaintiff had been warned on a previous day to beware of the dog. *TINDAL*, C. J., charged the jury that the first question was whether the dog was of a savage disposition to the knowledge of the defendant; and that the next question was whether the dog was so placed that the plaintiff, by the exercise of common care, might have avoided it; and,

whether the plaintiff was bound to take notice of the danger, as he had been warned on a previous day that the dog was there. But that while the defendant was bound to take common care, or else he could not recover, yet they had a right to look at this with reference to the master of the dog being present with him, and the judge said that in his opinion the plaintiff was entitled to recover. There was a verdict for the plaintiff. *Kelly v. Tilton*, 3 Keyes (N. Y.), 263; *McKone v. Wood*, 5 C. & P. 1; *Blackman v. Simmons*, 3 id. 138; *Sarch v. Blackburn*, 4 id. 297.

¹ *Brock v. Copeland*, 1 Esp. 203; *Wolf v. Chalker*, 31 Conn. 121; *Jones v. Perry*, 2 Esp. 482.

² *Sarch v. Blackburn*, 4 C. & P. 292; *Curtis v. Mills*, 5 id. 489.

bitten, but he must wait until he is attacked or positively sure to be, before he can exercise this right.¹ The right to kill does not exist because the animal is trespassing; for an ordinary trespass the remedy is by action.² But when he or his animals are attacked, or positively sure to be, the animal may be killed.³

SEC. 765. Mad dogs, or dogs reasonably suspected of having been bitten by a rabid animal, are nuisances, and may be killed by any person, if at large, off from the owner's premises. But in order to justify the killing for such a cause the person must be able to show that the dog *is* mad, or is reasonably suspected of having been bitten by a rabid animal, and the animal must be at large, off from the owner's premises, or in a situation that it is liable to escape.⁴

SEC. 766. The same rule prevails with reference to injuries from dogs, as in reference to other nuisances, any person who owns, keeps or harbors the dog may be made liable for the injuries committed by it.⁵

SEC. 767. Dogs accustomed to bark at night, and to disturb the neighborhood by their noise, are nuisances, and may be killed by any person annoyed thereby.⁶

¹ Wolf v. Chalker, 31 Conn. 121; Brown v. Carpenter, 26 Vt. 638; King v. Kline, 6 Penn. St. 318; Brown v. Hobinger, 52 Barb. (N. Y.) 15; Maxwell v. Putnam, 21 Wend. (N. Y.) 207; Lutz v. Stroke, 6 S. & R. (Penn.) 34; People v. Board of Police, 15 Abb. Pr. (N. S.) 167; Dunlap v. Snyder, 17 Barb. (N. Y.) 561; Williams v. Dixon, 65 N. C. 417; Killett v. Stannard, 2 Irish C. L. R. 156.

² Morris v. Nugent, 7 C. & P. 572; Wright v. Ramscott, 1 Saund. 84; Vine v. Lord Cawdor, 11 East, 568.

³ See note 1, *supra*.

⁴ Wolf v. Chalker, 31 Conn. 121; Putnam v. Payne, 13 Johns. (N. Y.) 312; Dunlap v. Snyder, 17 Barb. (N. Y.) 561; Maxwell v. Putnam, 21 Wend. (N. Y.) 407. As to liability for pursuing and killing on the owner's

premises, see *McAneany v. Jewett*, 10 Allen (Mass.), 151; *Perry v. Phipps*, 10 Ired. (N. C.) 259.

⁵ *Fish v. Skut*, 21 Barb. (N. Y.) 333; *Hewes v. McNamara*, 106 Mass. 281; *Marsh v. Jones*, 21 Vt. 378; *McKone v. Wood*, 5 C. & P. 1.

In *Smith v. Great Eastern R. R. Co.*, 2 L. R. (C. P.) 4, it was held that a person is not liable for injuries inflicted by a strange dog which he has driven away, and which is on his premises without his consent and against his will. The keeping, in order to charge one with liability, must be voluntary, must be such that the person can fairly be said to harbor it. To voluntarily permit it to remain and stay upon his premises. *McKone v. Wood*, *ante*.

⁶ *Brill v. Flagler*, 23 Wend. (N. Y.) 354.

SEC. 768. The keeping of a fierce dog near a public footway, or a path over which one has a right to pass, is a nuisance, operating as an obstruction, rendering the person keeping it there, if on a public footway, liable to indictment, and if upon a private footway, to an action as for an obstruction; and in either case liable to an action in favor of any person injured thereby.¹

CHAPTER TWENTY-FIFTH.

REMEDIES IN EQUITY.

SEC. 769. Grounds upon which equity predicates its jurisdiction.

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¹ Granger v. Finlay, 7 Irish C. L. Rep. 417.

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812. What the bill should contain.

813. Injunctions against public companies, when granted.

814. Verdict at law conclusive upon question of right.

SEC. 769. The preventive remedy for nuisances, aside from abatement by act of the party, is by injunction issuing out of a court of equity.¹ Formerly this power was exercised sparingly, and only in extreme cases, at least until after the right and the question of nuisance had been first settled at law. But now the only remedy for the abatement of a nuisance, except where special provision is made therefor by statute, is in a court of equity, and the jurisdiction is predicated upon the broad ground of preventing irreparable injury, interminable litigation, a multiplicity of actions, and the protection of rights.

¹ Lord HARDWICKE in *The Fishmonger's Co. v. The East India Co.*, 1 Dick. 163, placed the jurisdiction of a court of equity over nuisances upon "that head of mischief, that sort of material injury to the comfort of the existence" of those, who are affected by the nuisance, "requiring a power to prevent as well as to remedy an evil, for which damages, more or less, would be given in a court of law."

Lord ELDON in *Attorney-General v. Nichol*, 16 Ves. 342, 343; *Crowder v. Tinkler*, 19 id. 617. Where the injury is

not susceptible of adequate compensation in damages, or where the injury is a constantly recurring grievance a court of equity will interpose by injunction. *Dana v. Valentine*, 5 Metc. (Mass.) 8; *Mitford's Pleadings*, Jeremy, 144; *N. Y. v. Mapes*, 6 Johns. Ch. (N. Y.) 46; *Porter v. Witham*, 17 Me. 292; *McCord v. Iker*, 12 Ohio St. 387; *Arnold v. Klepper*, 24 Mo. 273; *Rhea v. Forsyth*, 37 Penn. St. 503; *Mohawk v. Artcher*, 6 Paige (N. Y.), 83; *Earl of Ripon v. Hobart*, Cooper, 343; 3 My. & K. 169; *Carlisle v. Cooper*, 21 N. J. 576;

Norris v. Hill, 1 Mann (Mich.); 202. Where equity affords a more adequate remedy. Bemis v. Upham, 13 Pick. (Mass.) 171. Where the injury is such that an action at law cannot afford the relief to which the party is entitled. Milhau v. Sharp, 28 Barb. (N. Y.) 238; Crump v. Lambert, 3 L. R. Eq. 409; Wilson v. Townsend, Dr. & Sm. 329. Equity will afford a corrective as well as preventive remedy. Penn. v. Wheeling Bridge Co., 13 How. (U. S.) 272. And where the injury is continuous and constantly recurring, equity can alone afford proper relief, and will do it, if warranted, by mandatory injunction. Corning v. Troy Iron and Nail Factory, 40 N. Y. 191.

Where the injury is such that it cannot be fairly compensated in damages; or if it is of such a continuous nature as to operate as a constantly recurring grievance, equity will interfere to protect the rights of parties against those whose wrongful acts inflict the injury, even though the actual damage is small, Dent v. Auction Mart Association, 35 L. J. (Ch.) 555; Bostock v. No. Staffordshire R. R. Co., 3 Sm. & G. 283; Attorney-General v. Southampton, 1 Giff. 363.

If a clear legal right is injured, and its destruction threatened, courts of equity will interpose. Herz v. Union Bank of London, 2 Giff. 686; Goose v. Bedford, 21 W. R. 449; Walker v. Brewster, 5 L. R. Eq. Cas. 25.

A wide distinction is made between a temporary and a continuous and constantly recurring nuisance. Swaine v. Great Northern R. R. Co., 4 De G. J. & S. 211.

The control of a court of equity over nuisances is of a preventive character, and therefore it will not interfere after the injury is done, unless the act constitutes a continuous nuisance, or to prevent its threatened repetition, Attorney-General v. R. R. Co., 2 Green (N. J.), 136; Peck v. Elder, 3 Sand. (N. Y.) 126.

A court of equity has concurrent jurisdiction with a court of law over a private nuisance, but, if it appears that a court of law can afford the party complete and adequate relief, the bill will be dismissed; and the bill will be dismissed as a matter of course, unless it shows that the plaintiff cannot have proper relief at law, Parker v. Winnepisogee, etc., Co., 2 Black (U. S.), 545.

An injunction is a proper remedy to stay mischief resulting from a public nuisance, Attorney-General v. Butt, 5 Ves. 129; Attorney-General v. Nichol, 16 id. 338; Attorney-General v. Forbes, 2 M. & K. 124; or to restrain purprestures, People v. Vanderbilt, 26 N. Y. 287; Attorney-General v. Richards, 2 Ansth. 603, and cases there cited; Attorney-General v. Johnson, Wils. 87.

The court interferes only where the nuisance is a nuisance at law, and where damages would be there given, even though no more than nominal, Duke of Grafton v. Hilliard, 18 Ves. 219; Lord Kilmore v. Thackeray, 2 Bro. C. C. 65; and will not interfere unless the injury will admit of some pecuniary recovery, Earl of Bathurst v. Burden, 2 Bro. C. C. 65.

Where an injury is long continued, or threatens to be continuous, a court of equity ought to interfere, Coulson v. White, Atk. 21; Bock v. Stacy, 2 Russell, 121.

It is not necessarily the case, because a person has no remedy at law, that a court of equity will not interfere. The jurisdiction of a court of equity is far more extensive than that of a court of law. It is the very fact that a court of law cannot afford ample redress for all injuries, or even any redress for some, that called courts of equity into existence, hence when a right is violated, even though it is a merely equitable right, which a court of law could not redress, equity will interfere, Corey v. Yarmouth, etc., R. R. Co., 3 Hare, 607; Emperor of Austria v. Day, 3 D. F. & J. 55, 254.

It is sufficient if a party can satisfy the court that a right is violated which should be protected, and that irreparable injury results either from the lack of power in a court of law to give relief, or from the inadequacy of the relief when obtained, Dyke v. Taylor, 3 D. F. & J. 467; Wood v. Sutcliffe, 8 Eng. Law & Eq. 217; Cory v. Yarmouth, etc., R. R. Co., ante; R. R. Co. v. Battersby, 8 Hare, 70; Earl of Ripon v. Hobart, 3 My. & K. 175; Child v. Douglass, 5 D. M. & G. 741.

Indeed, a court of equity will sometimes give relief, where there has been an adverse decision in a court of law. But these cases are rare, and rest upon peculiar grounds, Ollendorf v. Black, 4 D. G. & S. 211.

It will sometimes interfere to re-

strain the collection of a judgment at law for a nuisance where the party, by his own act, has placed himself in a position, by acquiescence in the nuisance, or other act, so that the enforcement of his legal right would be a virtual fraud upon the defendant; in such a case, the defendant must be free from fault, *Williams v. Earl of Jersey*, 1 Cr. & Ph. 92; *Nicholson v. Hooper*, 4 My. & Cr. 179; *Gerrard v. O'Reiley*, 2 Con. & Law. 165; *Jones v. The Royal Canal Co.*, 2 Molloy, 319. See *Bankhardt v. Houghton*, 27 Beav. 425, for a careful statement and discussion of the doctrine of equitable estoppel. Mere failure to remonstrate is not enough. "There must be wrong on one side, and freedom from blame on the other," 3 Phila. 363; *Carlisle v. Cooper*, 21 N. J. 576.

Where the right of a party seeking equitable relief is admitted, but the violation of it is denied, the party must have stated facts in his bill that show a violation of it, and must sustain it by proof on trial. *Imperial Gas Co. v. Broadbent*, 7 H. L. 600; *Earl of Ripon v. Hobart*, 3 My. & K. 169. Or, if the injunction is sought to restrain a threatened injury, that the act if carried out will be a violation of the right set up. *Emperor of Austria v. Day*, 3 D. F. & J. 217. An injunction will not be issued to restrain a threatened nuisance unless the facts stated in the bill clearly establish it.

Wicks v. Hunt, Johns. (Eng.) 372; *Haines v. Taylor*, 10 Beavan, 75; *Hanson v. Gardner*, 7 Ves. 307; *Attorney-General v. Steward*, 20 N. J. 415; *Duncan v. Hayes*, 22 id. 23; *Rhodes v. Dunbar*, 57 Penn. St. 274; *Dennis v. Eckhardt*, 54 id. 315; *Thiebault v. Conover*, 11 Fla. And this must appear beyond a reasonable doubt. *Ross v. Butler*, 19 N. J. 294; *Duncan v. Hays*, 22 id. 23.

The doctrine that "the fears of mankind, however reasonable," cannot make a nuisance, is not now recognized. *Hepburn v. Lordon*, 2 H. & M. 345, damp jute; *Weir v. Kirk*, 73 Penn. St. 315, powder magazine; *Malcolm v. Myers*, 6 Hill (N. Y.), 292, powder in city; *Bradley v. People*, 56 Barb. (N. Y.) 72; powder in large quantities. And a court of equity will now interfere to prevent apprehended mischief from keeping highly explosive and inflammable substances in public places where the fears of mankind are reason-

able.* But the case must be extraordinary and the danger probable rather than possible. *Weir v. Kirk*, 73 Penn. St. 315; *Hepburn v. Lordon*, ante.

But the bill must aver the right and its violation or its intended violation, so as to leave no doubt of both the right and the injury. *Green v. Wilson*, 21 N. J. 211.

The fact that there is a remedy at law, either by indictment or action, affords no reason why a court of equity should not interfere in a proper case to restrain either a public or private nuisance, but the fact that there is a legal remedy furnishes a good reason why it should confine the exercise of its powers to cases of a very clear character, and where the injury is irreparable, and cannot wait the slow progress of the legal remedy. *Bunnell's Appeal*, 69 Penn. St. 62.

And where the nuisance was merely temporary and easily removed, as a mere wall or fence across a highway, the remedy was refused until after trial at law. See, also, *Commissioners v. Long*, 1 Pars. Eq. Cas. (Penn.) 143; *Com. v. Rush*, 1 Harris (Penn.), 186; *Clark's Appeal*, 62 Penn. St. 447.

An injunction will not be issued when the right of the plaintiff is not clear, or the law on which it depends is doubtful. *Higbee v. Camden and Amboy R. R. Co.*, 20 N. J. 435; *Stevens v. Patterson R. R. Co.*, id. 126; *Babcock v. New York Stock Yard Co.*, id. 296.

Nor simply because the business is unlawful. It must also be shown to produce irreparable injury. *Babcock v. New York Stock Yard Co.*, ante.

Neither will it be employed as a punitive remedy. Its office is preventive. *Bank v. Gwynn*, 6 Bush (Ky.), 486; *Wangelin v. Gae*, 50 Ill. 459.

Nor will it be employed when the benefit to the party will be small and the inconvenience of the public will be great, unless the wrong complained of is so wanton and unprovoked as to deprive the defendant of all consideration. *Morris R. R. Co. v. Prudden*, 20 N. J. 530. See, also, *Attorney-General v. Ely, Haddenham, etc.*, R. R. Co., 6 L. R. Eq. 106, where an injunction was refused to compel a railroad company which had diverted its road *ultra vires*, but in good faith, and with a view to public convenience, when the public inconvenience resulting from mak-

ing the road *intra vires* would be great. See, also, *Higbee v. Railroad Co.*, 20 N. J. 435.

But these are cases against corporations acting under legislative authority where questions of public convenience properly arise. A different rule would prevail as between private persons when the public are not concerned.

Generally, a preliminary injunction will not be upheld when the party has a remedy at law, and will sustain no serious injury by delay while pursuing it. But if the defendant is irresponsible, quere? *Brown v. Metropolitan Gas-light Co.*, 38 How. Pr. (N. Y.) 133.

But when the plaintiff has established the nuisance at law, and that it is of a permanent or continuous character, and complete and full compensation cannot be awarded in damages, or where a multiplicity of suits will follow, or where the injury is otherwise irreparable, an injunction should be granted. *Davis v. Lambertson*, 56 Barb. (N. Y.) 480; *Carlisle v. Cooper*, 21 N. J. 576.

For the rule in New York in reference to injuries to real property, see *West Point Iron Co. v. Reymont*, 45 N. Y. 703.

And it must clearly appear from the bill and be established by the proof that the apprehended result will be a nuisance (*Cleveland v. Citizens Gas Co.*, 20 N. J. 201; *Adams v. Michael*, 38 Md. 123), and must leave no doubt that such will be the result (*Thiebault v. Conover*, 11 Fla. 224).

An injunction will not be granted to prevent the erection of a building which is not of itself a nuisance, and which will only become so by the use to which it is to be put, *Attorney-General v. Steward*, 20 N. J. 415.

But if the building is of itself a nuisance, and can be put to no use except such as will make its use a nuisance, its erection will be enjoined, *Cleveland v. Citizens Gas-light Co.*, 20 N. J. 201.

And when a building which might be devoted to proper uses, is devoted to improper uses and which produce a nuisance, its use for that purpose will be enjoined, *Attorney-General v. Steward*, 21 N. J. 340, affording relief which was denied when the application was first made. See the same case, 20 N. J. 415.

An injunction will be granted to prevent unlawful acts by public companies (*Stewart's Appeal*, 56 Penn. St. 413), as where they exceed their powers to the injury of individuals (*Imperial Gas Co. v. Broadbent*, 7 D. M. & G. 389; *Ware v. Regents Canal Co.*, 3 D. & G. 227), even though done under a mistake (*Sandford v. R. R. Co.*, 24 Penn. St. 378; *Mohawk, etc., R. R. Co. v. Artcher*, 6 Paige's Ch. (N. Y.) 83), by doing an act so as to produce a nuisance, when it could be as conveniently done without such results, *King v. Morris & Essex R. R. Co.*, 18 N. J. 371; *Richards v. Richards*, John. (Eng.) 255, or by doing it in a careless, negligent or unskillful manner, as by excavating near one's premises without taking proper precautions against damage thereto (*Dent v. Auction Mart Co.*, 35 L. J. (Ch.) 555; *Richardson v. Vt. Central R. R. Co.*, 25 Vt. 472; *Glover v. No. Staffordshire R. R. Co.*, 20 L. T. (Q. B.) 376), or blasting rocks so as to injure adjoining property (*Hay v. Cohoes Co.*, 1 N. Y. 159; *Tremain v. Cohoes Co.*, id. 163), or devotes lands taken by it to purposes not contemplated by the act creating it, which operates as a nuisance to individuals as a regatta, that collects a crowd of people in the vicinity of one's grounds (*Bostock v. N. Staffordshire R. R. Co.*, 3 D. M. & G. 583), or taking lands after their compulsory powers have ceased (*Imperial Gas Co. v. Broadbent*, 7 H. L. 600), or erecting embankments so as to flood lands when proper outlets could have been made to discharge the water (*Broughton v. Carter*, 18 Johns. (N. Y.) 404; *Whitcomb v. Railroad Co.*, 25 Vt. 68 & 69; *Gardner v. Newburgh*, 2 Johns. Ch. 162; *Hooker v. Railroad Co.*, 14 Conn. 146), or using their property in a wrongful manner so as to produce a nuisance to property owners. As running trains near a church on the Sabbath, and ringing bells, blowing the whistle and letting off steam so as to disturb worship there and destroy the value of the premises for church purposes. *First Baptist Church v. Railroad Co.*, 5 Barb. (N. Y.) 79, overruling; *Same v. Troy etc., R. R. Co.*, 4 Barb. 474.

But see *Sparhawk v. Railroad Co.*, 57 Penn. St., 374, where the remedy was denied because the plaintiff had no special damage therefrom.

When an injunction is sought against apprehended mischief, the injury must

be real and not merely *damnum absque injuria*. Erchenbrecher v. Cincinnati, Cin. (Ohio) 368; Hahn v. Thornberry, 7 Bush (Ky.), 403.

So the use of defective machinery, as engines that scatter coals (King v. Morris R. R. Co., 18 N. J. 371), or throwing coals from engines so as to endanger property (Baltimore R. R. Co. v. Dorsey, 37 Md. 19), or spark protectors that allow sparks to escape. Chicago, etc., v. McCahill, 56 Ill. 28; Spalding v. Chicago, etc., R. R. Co., 30 Wis. 110.

Erecting gas works so as to emit noxious smells and gases and render the enjoyment of surrounding property uncomfortable (People v. Manhattan Gas-light Co., 64 Barb. (N. Y.) 55), or discharging refuse from their works into a stream so as to impair their value for manufacturing purposes (Carhart v. Auburn Gas-light Co., 22 Barb. (N. Y.) 297), or depositing refuse upon its lands so as to impregnate adjoining lands with noxious gases and destroy a well (Ottawa Gas-light Co. v. Thompson, 39 Ill. 598), or erecting stock pens so near to habitations or places of business as to impair their comfortable enjoyment by foul odors and stenches. Illinois Cent. R. R. Co. v. Grahill, 50 Ill. 241; or erecting machine works in a locality where the noise therefrom becomes a nuisance to residents. Cooper v. N. Brit. R. R. Co. 27 Jur. 241; or for diverting a water-course (Webb v. Portland Manufacturing Co., 3 Sum. (U. S.) 189), and not restoring it to its original channel (Cott v. Lewiston R. R. Co., 36 N. Y. 217), but in Wisconsin it is held that even though the waters of a navigable stream are being diverted by a corporation, and an actual obstruction of navigation ensues, that the right must be first settled at law (Sheybogan v. Sheboygan R. R. Co., 21 Wis. 667), or for erecting a bridge over a public stream producing special damage to one navigating the stream skillfully (Jolly v. Terre Haute B Co., 6 McLean (U. S.), 238; Columbus Ins. Co. v. Curtenas, 6 McLean (U. S.), 209), or erecting a railroad or other obstruction along a public street, so as to cut off access to the premises of one who is the owner of the fee (Atkinson v. Phila. & Trenton R. R. Co., 14 Haz. Pa. Reg. 129; Osborne v. Brooklyn R. R. Co., 5 Blatch. (C. C. U. S.) 366; Black v. R. R. Co., 58 Penn. St. 249; Fort v. Graves, 29 Md. 188), or divert-

ing the water of a stream to supply a town with water, though there be no actual damage (Wilts, etc. v. Swinton Water-works Co., 9 L. R. Ch. 451), or so as to impair navigation (Philadelphia v. Gilmartin, Penn. St.), and, indeed, any act not within the scope of the power given which produces injury to private rights, may be restrained by injunction. But, unless the right affected is a substantial right, the public convenience will be considered in determining whether the act or use shall be enjoined, or the party turned over to his legal remedy.

Equity will not interfere at the suit of a person having no *real* interest in the subject-matter involved. Leake v. Beckell, 1 Y. & J. 337; Hunter v. Nockold, 15 L. J. Ch. 320. No one can maintain a bill for the protection of another's right, unless this protection comes as the result of protection given to his own. Attorney-General v. United Kingdom Electric Tel. Co., 30 Beav. 287. And generally when it can be satisfactorily established that a suit is brought in the name of one person, whose real object is to secure protection to the property of another, and which was brought at the instigation of that other person, and would not have been brought for the protection of the property named in the bill, except at the instigation of another, equity will refuse to interfere. Pentney v. Paving Comm'rs, 13 W. R. 980. As equity will only relieve one who comes into court with direct equities. Roberts v. Bogon, 3 L. J. Ch. 113. But when a bill is fairly instituted, with an honest purpose of obtaining personal relief, the fact that others are to be equally benefited, although not parties to the bill, will not, on the one hand, operate to defeat the plaintiff's relief, nor, on the other hand, will it be allowed to weigh in granting it. Evans v. Coventry, 5 D. M. & G. 911; Mississippi, etc., v. Ward, 2 Black (U. S.), 415; Mozley v. Alston, 1 Ph. 790; Ackroyd v. Briggs, 14 W. R. 25; Coust v. Harris, T. R. 514. Tenants in common may maintain a bill for injury jointly, or either may sue alone to protect his own interest. Batty v. Hill, 1 H. & M. 264. Parting with one's interest in the property affected by the nuisance after a bill brought will not defeat the action or prevent the granting of an injunction. Bind v. Lake, 1 H. & M. 121. But

SEC. 770. By irreparable injury, is not meant such injury as is beyond the possibility of repair, or beyond possible compensation in damages,¹ nor necessarily great injury,² or great damage;³ but that species of injury, whether great or small, that ought not to be submitted to on the one hand, or inflicted on the other, and which, because it is so large on the one hand, or so small on the other, is of such constant and frequent recurrence that no fair or reasonable redress can be had therefor in a court of law.⁴

when the bill is brought *after* the plaintiff has parted with his interest it will be dismissed. *Saunders v. Saunders*, 3 Drew. 387; *Clements v. Wells*, 1 L. R. Ch. 200; *Sweet v. Mangham*, 11 Sim. 51. Neither will the court grant an injunction against a person who is not a party to the bill. *Schalk v. Schmidt*, 1 McCarter (N. J.), 268; *Water Co. v. R. R. Co.*, 12 L. T. (N. S.) 366. The burden of establishing all the allegations of the bill, as well as of the equities to warrant an injunction, are upon the plaintiff. *Child v. Douglass*, 5 D. M. & G. 741. Courts of equity often impose terms upon a party as a condition to the granting of an injunction. *Spencer v. London, etc., R. R. Co.*, 1 Ra. Ca. 159; *Bromwell v. Holcomb*, 3 M. & C. 737. Or upon the defendant as a condition for withholding it. *Bell v. R. R. Co.*, 1 Ra. Ca. 616; *Guion v. Trask*, 1 D. F. & G. 373.

¹ *Attorney-General v. United Kingdom Tel. Co.*, 30 Beav. 287; *Elmhirst v. Spencer*, 2 Mac. & G. 50; *Wood v. Sutcliffe*, 2 Sim. (N. S.) 165; 8 Eng. Law & Eq. 217.

² *Casebeer v. Mowrey*, 58 Penn. St. 234.

³ *Wood v. Sutcliffe*, ante; *Corning v. Troy Nail and Iron Co.*, 40 N. Y. 191; *Ridgeway v. Roberts*, 4 Hare, 106.

⁴ In *Clowes v. N. Staffordshire Potteries Co.*, 8 L. R. Ch. App. 125, Lord Justice MELLISH very clearly defined the species of irreparable injury arising from a nuisance, against which equity would relieve. In that case a bill was brought against the defendants to restrain them from maintaining the water in a certain compensation reservoir erected by them in aid of their works. The complaint was that before the erection of this reservoir the water was quite clear, and suitable for their business as silk dyers, except for two or three days each year after a

flood; but that since the erection of the reservoir the water would remain in a muddy and impure state for ten or fourteen days after a flood, and was often as late as the eighth day after a rain in a more impure state than before. The plaintiff complained that as a result of this his tenants had been unable to dye the silk sent to them by manufacturers with the same brilliant colors as before the construction of the reservoir, and had lost some of their customers in consequence. Vice-Chancellor MALINS refused to grant an injunction, saying: "It is perfectly plain from the admissions on both sides of this case that the proper remedy here would be the construction of a filter. The tenants of the plaintiff were offered a filter. They never would say they would be satisfied with it."

* * As to Miss Clowes, if she has sustained damages there is an adequate remedy for it at law, and by an action at law she can recover all that she can possibly be entitled to, namely, the expense of the construction of a filter, that being, according to my view, the utmost measure of injury that she has sustained. It is not a trifling thing to grant an injunction against a company who have spent large sums of money in the construction of such a work as this reservoir. * * I have no doubt that the clearing out of this reservoir would cost from £10,000 to £20,000. It is gravely suggested, that for such an injury as this this great expense ought to be incurred." The injunction was denied and the case went to the court of Chancery Appeal, where the decision of the vice-chancellor was reversed and an injunction granted, not upon the ground that a court of law would be likely to give damages only to the extent of the value of a filter, but upon the ground that there was a wrong on one side, and a violation of

SEC. 771. When a legal right is violated, by an act that amounts to a nuisance which is of a continuous or permanent nature, the very fact that a jury only gives nominal damages, which are utterly inadequate to protect the right, and place the party injured in *statu quo*, furnishes the best reason why a court of equity should interfere to protect the right, and prevent the

a right on the other, for which a court of law would most likely give no more than *nominal* damages. The opinion of Lord Justice MELLISH disposes of the question of the right of a party to an injunction against a nuisance when a right is violated, and no more than nominal damages are inflicted, in a masterly manner. He said: "I cannot conceive that, an action at law being maintainable, relief is not to be had in this court. If this case had happened before Sir John Rolt's act I presume that the ordinary course would be that, having been filed, an action would have been sent to be tried at law. The action having been tried nominal damages would have been obtained, and the plaintiff would have come to this court for an injunction, would this court have sent her away, and said that she should bring action after action, instead of having her remedy by injunction? I cannot think that would have been so. The Vice-Chancellor said, "if you can recover at all at law, I think you would get no greater damage than would be sufficient to pay for a filter, and that would be a sufficient compensation." But with submission to the Vice-Chancellor, *I do not think the plaintiff would get enough to pay for a filter*. She would only get in the first instance, *nominal* damages, because in a case of this kind you cannot prove specific damages, and there is no evidence here of specific damage, and upon that evidence you would only get 40s. damages. Then you must bring a second action, and what you would get in the second action, would be the actual damage which you had proved you had sustained between the bringing of the first action and the second. Then you would bring a third action with the same result. *It is because it is most inconvenient to leave the rights of parties to be determined in that way, and in fact because it is impossible to leave them in that way, that this court*

has always in such cases given relief."

The learned Lord Justice in this case gave expression to the true rule, controlling this class of cases. The very fact that a right has been violated, and that this violation is constantly going on, and that a court of law cannot in damages, compensate the injury or stop the wrong, furnishes the best possible reason for the interference of a court of equity, and the fact that the actual injury resulting from the violation of the right is small, and the interest to be affected by the injunction is large, is not to weigh against the interposition of preventive power, when on the one hand a right is violated, and on the other, a wrong is committed. It will not do to lose sight of *small rights*. If their violation is tolerated, gradually the violation of larger rights will find an equal toleration, and the wildest chaos and confusion will ensue. The majesty and dignity of the law is best preserved, when the scales of justice are balanced evenly, and its powers asserted to uphold even the *smallest* interests, against aggression from others. Vice-Chancellor BRUCE, in *Attorney-General v. Sheffield Gas Co.*, 19 Eng. Law & Eq. 648, gave utterance to a rule, which, although not adopted in that case, has since become the rule which governs the English courts in all such cases. "It seems to me," said he, "that even slight infringements, of rights respecting real estate, * * require to be watched with a careful eye, and repressed with a strict hand by a court of equity, where it can exercise jurisdiction," *Broadbent v. Imperial Gas Co.*, 7 D. M. & G. 436; *Attorney-General v. Gee*, 10 L. R. Eq. Ca. 131; *Crossley v. Lightowler*, 2 L. R. Ch. App. 478; *Isenberg v. East India, etc., Co.*, 33 L. J. (Ch.) 392; *Lumley v. Wagner*, 1 D. M. & G. 616 *Attorney-General v. Aspinwall*, 2 M. & C. 613; *Wandsworth Board of Works v. R. R. Co.*, 31 L. J. (Ch.) 854; *Tre-*

wrong, on the ground of irreparable injury. A court of law, by such a verdict, has shown itself powerless to afford the relief to which the party is entitled, and, if a right has been violated by a wrongful act, as such a verdict establishes, the party in equity and good conscience ought not to be compelled to submit to it, even though his damage *is* small, and the inconvenience to the

main v. Lewis, 4 M. & C. 254; *Lloyd v. R. R. Co.*, 2 D. J. & S. 568. See also, a strong case in support of the doctrine of the text (*Goodson v. Richardson*, 9 L. R. Ch. 224), where it was held that the mere invasion of a right without actual damage, which was continuous in its nature, entitles a party to an injunction.

In a recent English case, *Wilts, etc., v. Swinton Water-works Co.*, 9 L. R. (Ch. App.) 451, the right of a party to an injunction to restrain the violation of a right where no actual damage was shown, was raised and decided. In that case the plaintiffs had been empowered by act of parliament to build a canal from the river Thames, near Abingdon, to another canal near Trowbridge, and for that purpose were authorized to make cuts and branches to supply the canal with water from all such springs as should be found in making the same, and from all rivers, springs, brooks, streams and water-courses within the distance of 2,000 yards from the canal or any of the cuts, or from any reservoir or reservoirs made for its use. The canal was made, and from 1807 to 1870, one of the principal sources of supply was a stream called the *Wroughton stream*. On this stream in 1807 the plaintiffs bought a mill for the purpose of obtaining water, and diverted the stream for that purpose, no longer using the mill for mill purposes. In 1866, the defendant corporation was formed for the purpose of supplying the town of Swinton with water. Previous to that time and down to 1867, the plaintiffs had sold the water from their works to a company for the supply of the town. The defendants in 1867 bought a mill on the *Wroughton stream* and erected a reservoir on its site which diverted the water out of the stream as well as of many other streams that had formerly supplied the plaintiff's canal. It did not appear

that the diversion of the water at the time when the bill was brought, injuriously affected the supply for the navigation of the canal, or that they were sustaining any actual damage from such diversion. The master of the rolls dismissed the bill, but upon appeal, an injunction was issued upon the ground that although no actual damage ensued from the diversion, yet an injury to the plaintiff's right, and an exercise by the defendants of an unlawful act which, if suffered to go on for 20 years, would ripen into a right, having been shown, the plaintiff was entitled to the protection of a court of equity for the preservation of his right.

A similar doctrine was held by *STORY, J.*, in *Webb v. Portland Mfg. Co.*, 3 Sum. (U. S.) 189; *Jerome v. Ross*, 7 Johns. Ch. (N. Y.) 315; *Van Bergen v. Van Bergen*, 3 id. 282; *Gardner v. Newburgh*, 2 id. 162; *Turnpike Co. v. Miller*, 5 id. 101; *Lewis v. Stein*, 16 Ala. 214; *Bonaparte v. Railroad Co.*, 1 Bald. (U. S. C. C.) 231; *Belknap v. Trimble*, 3 id. 577; *Babcock v. New Jersey Stock Co.*, 20 N. J. 296.

The courts interfere to protect substantial rights even when their invasion produces no actual damage, but the invasion is clearly established, to protect the right from loss by long user by the wrong-doer. *Sir G. J. MELLISH, L. J.*, in *Wilts, etc., v. Swinton Water Co.*, ante, p. 461. See, also, *Bonomi v. Backhouse*, 1 E. B. & E. 622; *Wood v. Waud*, 3 Exchq. 748. And in such cases damages are so insignificant at law as to afford no protection. *Webb v. Portland Mfg Co.*, ante; *Pike Co. v. Plank Road Co.*, 11 Ga. 246; *Dickenson v. Canal Co.*, 19 Eng. Law & Eq. 287; *King v. Rochdale Canal*, 21 id. 177; *Corning v. Troy, etc.*, 34 Barb. (N. Y.), 485; *aff'd Ct. Appeals*, 40 N. Y. 160. See *Wetzel v. Walsh*, 45 Miss. 560; *Wahle v. Reinbach*, 76 Ill. 322.

defendant by having his works stopped would be great.¹ In such a case the party, in order to preserve his rights, would be driven to institute suits at law indefinitely, and hence upon the ground of preventing a multiplicity of actions, the courts would ordinarily interfere by injunction.² But if the right injured is not a substantial right of property, and is of a merely temporary nature, and the damage to the plaintiff is merely trifling, while the inconvenience and damage to the defendant by having his works stopped would be great, the courts will generally leave the party to his remedy at law.³ But, in this country, as well as in England, where the right is clear, and the nuisance established beyond a doubt, an injunction will be issued as a matter of course, whether the injury is large or small.⁴ But if the injury is of a merely trifling nature, and the nuisance temporary; that is, of such a character as not to operate as a constantly recurring grievance, and does not affect a substantial right of property, the courts will usually leave the party to his remedy at law;⁵ but if the injury is small, and yet the nuisance is of a continuous or permanent nature, so as to operate as a constantly recurring grievance, an injunction will issue, unless the party injured has, by

¹ *Clowes v. N. Staffordshire, etc. Co.*, 8 L. R. Ch. 125; *Wood v. Sutcliffe*, 8 Eng. Law & Eq. 271; *Elwell v. Crowther*, 31 Beav. 167. The only question is, whether a nuisance has resulted or will result, *Haines v. Taylor*, 2 Ph. 209; *Rhodes v. Dunbar*, 54 Penn. St. 157; *Attorney-General v. Steward*, 20 N. J. 415; 21 id. 234; *Duncan v. Hayes*, 22 id. 23; *Shields v. Arndt*, 3 Green, 234; *Holsman v. Boiling Springs Co.*, 1 McCarter (N. J.), 343; *People v. Third Av. R. R. Co.*, 45 Barb. (N. Y.) 63; *Att'y-Gen'l v. Richmond*, 2 L. R. Eq. 306. In *Dickenson v. Grand Junction Canal Co.*, 19 Eng. Law & Eq. 287, an injunction was granted to prevent the defendants from injuring the plaintiff's rights, when it appeared that there was no damage, but a real benefit ensued to the plaintiff from the defendant's acts.

² If the thing is in its nature a nuisance, equity will interfere, *Van Bergen v. Van Bergen*, 3 Johns. Ch. (N. Y.) 282; *Turnpike Co. v. Ryder*, 19 id. 615; *N. Y. v. Mapes*, 6 id. 46; *Gardner v. Newburgh*, 2 id. 162; *Belknap v. Trimble*,

Paige's Ch. (N. Y.) 577; *Corning v. Lawrence*, 6 Johns. Ch. (N. Y.) 439.

³ *Wolcott v. Mellick*, 3 Stockt. (N. J.) 204; *Huckenstine's Appeal*, 70 Penn. St. 160; *Am. Rep.*; *Richards v. Phenix Iron Co.*, 57 Penn. St. 105; *Attorney-General v. Sheffield Gas Co.*, 19 Eng. L. & Eq. 639; *Swaine v. Gt. Northern R. Co.*, 33 L. J. (Ch.) 399; *Cleeve v. Mahany*, 9 W. R. 882; *Attorney-General v. Gee*, 10 L. R. Eq. Ca. 131.

⁴ *Clowes v. Potteries Co.*, 8 L. R. Ch. 125; *Wood v. Sutcliffe*, 8 Eng. L. & Eq. 217; *Coulson v. White*, 3 Atkyns, 21; *Wandsworth Board of Works v. R. R. Co.*, 31 L. J. (Ch.) 854; *Goldsmid v. Tunbridge Wells Improvement Co.*, 1 L. R. (Ch.) 349; *Broadbent v. Imperial Gas Co.*, 7 D. G. & M., or even if no actual damage is sustained, *Wilts & Berks Canal, etc., Co. v. Swinton Water Works Co.*, 9 L. R. Ch. 451; *Webb v. Portland Manufacturing Co.*, 3 Sum. (U. S.) 189.

⁵ *Attorney-General v. Gee*, 10 L. R. Eq. Ca. 131; *Huckenstine's Appeal*, 70 Penn. St. 415; 10 Am. R. 170; *Richards v. Phenix Iron Co.*, 57 Penn. St. 107.

his own conduct, done that which deprives him of equitable relief,¹ or unless the nature of the injury is such that it never could be determined whether the injunction had been violated

¹ *Hills v. Miller*, 3 Paige's Ch. (N. Y.) 254; *Wood v. Sutcliffe*, 8 Eng. L. & Eq. 217; *Broadbent v. Imp. Gas Co.*, 7 D. M. & G.; *Barnes v. Hathorn*, 54 Me. 274.

Where an action at law is pending, even though there has been a verdict for the plaintiff, but the case is still pending on appeal, an injunction will not be granted except in extreme cases until the final determination of the litigation (*Eastman v. Amoskeag Co.*, 47 N. H. 71), nor after there has been a decision in his favor in the appellate court, if the case has been returned to the lower court for a new trial, particularly when there have been several trials resulting in four disagreements of the jury, one verdict for the plaintiff for one cent damages, and a later trial with a verdict for the defendant (*Bassett v. Company*, 47 N. H. 426), and in this case the court placed much stress upon the fact that the plaintiff had stood by for several years allowing the defendants to go on making expenditures about their works, without asserting his right, and still further upon the fact that he purchased the land, which appeared to be mostly swamp land, unfit for the purposes of cultivation, for the purpose of bringing the defendant to terms. It would hardly seem to be of much importance with what motive the land was purchased. The real and only questions seem to be 1st, whether the plaintiff's legal rights had been invaded, and secondly, whether by his *laches* he had deprived himself of equitable interference? On the last ground, it would seem the judgment was well sustained.

Where there is a clear nuisance, and the injury is established, yet if there is a complete remedy at law, equity will not interfere. In a case where a large manufacturing company made use of bituminous coal in a manufacturing town, which emitted dense masses of smoke and cinders which was at times very injurious to the plaintiff's furniture, dwelling and cloth manufactory; yet, it appearing that the damages were capable of estimation, and that the defendants were amply responsible therefor, an injunc-

tion was refused. *Richards v. Phenix Co.*, 57 Penn. St. 105.

Where damages will compensate for a nuisance, equity will not interfere until after it has been demonstrated by a trial at law that no adequate damages can be recovered (*Gray v. R. R. Co.*, 1 Grant's Cas. (Penn.) 342), and a bill praying for an injunction will be dismissed for want of equity, unless it appears that the injury is irreparable or cannot be adequately compensated in damages (*Coe v. Lake Co.*, 37 N. H. 254; *Richards v. Phenix Co.*, 57 Penn. St. 105; *Rhodes v. Dunbar*, id. 274), but in the latter case the bill prayed for an injunction restraining the re-erection of a planing mill, upon the ground that, from the character of fuel to be used (shavings, etc.), dense masses of smoke would be developed, the danger to his property from fire and explosion of the engine would be imminent, the rates of insurance be largely increased, and his property injured by the smoke and cinders. The bill did not show, nor the proof establish that the class of fuel complained of would be used, but the main reliance was placed upon the increased danger from fire and explosion. The nuisance was wholly *eventual* and contingent. The building could be used without being productive of ill results, and the increased risk from fire, and danger from explosion was held not to be sufficient to warrant equitable intervention. The injunction was denied, *READ and SHARSWOOD, JJ.*, dissenting.

In reference to injunctions to restrain occupations or uses of property that endanger property from fire, or expose persons and property to danger from explosion, the rule seems to be, and that too from necessity, that in all cases where the danger is *possible*, but not *probable* (*Dumesnil v. Dupont*, 18 B. Mun. (Ky.) 800), or when it may or may not be productive of injury, if carefully conducted, that so long as due care and caution is observed, such uses will not be ranked as nuisances (*Davidson v. Isham*, 1 Stockt. (N. J.) 186; *Wolcott v. Mellick*, 3 id. 504). Thus in one case the plaintiff sought

or not. Thus, even after a verdict at law, an injunction was refused, to restrain a mill owner from the discharge of the waters of a certain brook, which were penned back by a dam erected

to restrain the placing of a steam boiler under a street, upon the ground that his property was thereby in danger of destruction, as well as his own life, from its explosion. But the injunction was denied (*Carpenter v. Cummings*, 2 Phila. Rep. 74; *Spencer v. Campbell*, 9 W. & S. (Penn.) 32), and this was also held not to be sufficient to warrant an injunction against setting up a steam boiler near the plaintiff's premises, in (*Davidson v. Isham*, 1 Stockt. (N. J.) 186), and such would seem to be the rule in New York (*Lossee v. Buchanan*, 51 N. Y. 476), where in an action for damages, resulting from the explosion of a steam-boiler, it was held that negligence must be proved. In Illinois it is held that the fact of explosion is *prima facie* evidence of negligence (*Illinois Central R. R. Co. v. Phillips*, 49 Ill. 234). The careful and proper use of a steam-engine, even in a populous locality, is not regarded as a nuisance.

But the keeping of highly explosive and inflammable ingredients in a situation where the lives or property of others are thereby exposed, is a nuisance which will be restrained. As a cotton press (*Ryan v. Copes*, 11 Rich. (S. C.) 217; damp jute, *Hepburn v. Lordon*, 2 H. & M. 434, or gunpowder, *Wier v. Kirk*, 74 Penn. St. 272. But, where the injury is doubtful, eventual or contingent (as in this case a blacksmith shop in a populous locality) an injunction will be denied, *Butler v. Rogers*, 1 Stockt. 487; *Davidson v. Isham*, 1 id. 186; *Earl of Ripon v. Hobart*, My. & K. 169; *Sparhawk v. R. R. Co.*, 54 Penn. St. 401.

In Illinois it is said that courts of equity will in some cases interpose to restrain the erection of a nuisance, but the court will proceed with great caution, particularly when there is a remedy at law, until after a verdict establishing the right. *Dunning v. Aurora*, 41 Ill. 481; *Lake View v. Letz*, 44 id. 81.

An injunction will be issued to restrain a nuisance that shocks the sense of decency, as the keeping of jacks and standing them for mares in full view of one's dwelling. *Hayden v.*

Tucker, 37 Mo. 214. So to restrain the keeping of a brothel near one's dwelling. *Hamilton v. Whitridge*, 11 Md. 128.

So an injunction will be issued to prevent the pouring of slops from a brewery upon one's premises so that they will flow upon the premises of another, causing offensive smells. *Smith v. Fitzgerald*, 24 Md. 316. So also to restrain their being turned into a common sewer which is discharged into a navigable stream near one's wharf so as to cause offensive smells and impair navigation. *Hudson R. R. Co. v. Loeb*, 7 Robt. (N. Y.) 418.

An injunction will be issued to restrain the burial of the dead in a cemetery near one's premises when it appears that the interments there will endanger health by corrupting the air or contaminating the water of wells or springs. *Clark v. Lawrence*, 6 Jones' Eq. (N. C.) 83.

So, too, the maintenance of a private tomb upon one's own land near the residence of another, when it is established that by reason of the effluvia arising from the bodies kept there (in this case nine) renders the air unwholesome and impairs the market value of property, is held a nuisance. *Barnes v. Hathon*, 54 Me. 224. See also *Ellison v. Commissioners*, 5 Jones' Eq. (N. C.) where it was held that the burial of the dead near one's premises would not be restrained except where the burial was productive of nuisance by the contamination of the atmosphere, or of water. *Lake View v. Rose Hill Cemetery*, 70 Ill. 191. In the same case, the court refused to enjoin the clearing up of marsh land which it was claimed would render the atmosphere unwholesome, and impair the health of the neighborhood.

In North Carolina the usual practice is to send an issue to a court of law to determine the question of nuisance before an injunction will issue, but in a case demanding immediate relief, where the facts set up in the bill leave the nuisance unquestionable, this practice will not be resorted to. *Frizzle v. Patrick*, 6 Jones' Eq. (N. C.) 354.

Mere diminution of the value of

by him, and discharged upon a lower owner in unusual quantities, so as to overflow the plaintiff's meadow. The court held, that in such instances, unless the injury and the cause thereof were both apparent, and the cause of the injury susceptible of regulation within the proper exercise of the rights of either party, except where great and irreparable injury was established, the parties would be left to their legal remedy.¹ But when the injury complained of is such that the relative rights of the parties are susceptible of proper exercise and control, as the diversion of the water of a stream,² the flooding of upper lands by a dam,³ the pollution of the air by noxious odors,⁴ or any act which produces injury to another, as the unauthorized obstruction of a water-course,⁵ an injunction will issue if there is no adequate remedy at law, however difficult it may be to frame an order that will properly limit the rights of the parties.⁶

SEC. 772. By *continuous* nuisance, and *constantly recurring* grievance, or *permanent* injury, is not meant a constant and unceasing nuisance or injury, but a nuisance which occurs so often, and is so necessarily an incident of the use of property complained of, that it can fairly be said to be continuing, although not constant or unceasing. A nuisance that arises from the use of property in a particular way, which occurs only once in two weeks, and lasts only two hours each day when used, is regarded as a continuing nuisance, if the nuisance is the necessary result of such use.⁷

property is not sufficient of itself to constitute the use of property a nuisance. In order to have that result, the diminution must be occasioned as the result of an actual nuisance productive of some of the concomitants that fairly produce the diminution, as noxious smells, smoke, the deprivation of easements, or an actual injury to some right the injury to which diminishes the value of the premises. Many uses of property may be strictly lawful that nevertheless impair the market value of surrounding property seriously, and so long as such use invades no legal right of another, by any of the agencies productive of actual nuisance, the damage is *damnum absque injuria*. *Zabriskie v. Railroad Co.*, 2 Beas. (N. J.) 314; *Duncan v. Hayes*, 22 N. J. 25; *Ross v. Butler*, 19

id. 294. In *Harrison v. Good*, 'L. R. 125, this question is discussed in a very able manner. See also *Wolcott v. Mellick*, 3 Stockt. (N. J.) 204.

¹ *Wason v. Sanborn*, 45 N. H. 126.

² *Corning v. Troy, etc., Factory*, 39 Barb. (N. Y.) 311.

³ *Sheldon v. Rockwell*, 8 Wis. 166; *Colwell v. May Landing, etc., Co.*, 19 N. J. 245; *Hill v. Sayles*, 12 Cush. (Mass.) 451.

⁴ *Cleveland v. Gas Co.*, 20 N. J. 201.

⁵ *Webb v. Portland Manf. Co.*, 3 Sum. (U. S.) 324.

⁶ *Patten v. Marsden*, 14 Wis. 473.

⁷ *Ross v. Butler*, 19 N. J. 294. So a nuisance that occurs only once a year, in times of high water or periodical freshets, is regarded as a continuous nuisance. *Clowes v. N. Staffordshire Potteries Co.*, cited ante.

SEC. 773. By *substantial right* is meant a right incident to real property, arising either as a natural and necessary incident to the property itself, or one which is annexed to it either by grant or prescription, and is essential to the reasonable and convenient enjoyment of the property, either for the purpose to which it is devoted, or such purposes as the party may choose to devote it to. It is not essential that the right should be *necessary* to the enjoyment of the property, if it adds to the convenience of its use, or to its comfortable enjoyment, so as in *any* sense, whether in point of comfort or eligibility of enjoyment, to have a special value and importance, and is annexed or incident to the estate as a legal right; it is a *substantial* right within the meaning of the term, and is entitled to protection from invasion or injury as much as the land itself. By *substantial right*, is not meant a right of great pecuniary value, but a *legal* right, whether of great or small importance, that is the special property or privilege of the occupant, or that is a necessary or special incident of the estate itself. It need have no special pecuniary value. Indeed, many such rights have none, but, if it is a right which the law recognizes, it is a *substantial* right, within the meaning of the term as used by the courts.¹

¹ The right to the natural flow of water is a substantial right. *Tyler v. Wilkinson*, 4 Mason (U. S.), 347; *Mason v. Hill*, 5 B. & Ad. 1. The right to have it come to one's land undiminished in quantity is a substantial right. *Id.*; *Chasemore v. Richards*, 7 H. L. 349; *Wood v. Wand*, 3 Ex. 748; *Clinton v. Myers*, 46 N. Y. 411; 7 Am. Rep. 373. And so is the right to have it come unpolluted in quality. *Holsman v. Boiling Springs Co.*, 1 McCar-ter (N. J.), 264; *Stockport Waterworks Co. v. Potter*, 3 H. & C. 300; *Wood v. Sutcliffe*, 8 Eng. Law & Eq. 217. The right to ordinarily pure air is a substantial right. *Francis v. Schellkopf*, 53 N. Y. 156; *Cleveland v. Citizens Gas-light Co.*, 20 N. J. 201; *Crump v. Lambert*, 3 L. R. Eq. 409; *Adams v. Michael*, 38 Md. 407. The right of access to a street is a substantial right. *Stetson v. Faxon*, 19 Mass. 76. The right of drainage for lands is a substantial right, *Bassett v. Salisbury Manufacturing Co.*, 43 N. H. 538, reversing the judgment of the lower court. See, also, same case in 28 N. H. 38.

So is any right annexed to the estate or lawfully vesting in its occupant, as a right of way; *Shipley v. Caples*, 17 Md. 179; a right to light and air in a certain manner; *Cherry v. Stein*, 11 Md. 1; a right of access to the sea; *Attorney-General v. Boyle*, 10 Jur. (N. S.) 309; a right to an entrance to premises acquired by grant or prescription; *Daniel v. Anderson*, 31 L. J. (Ch.) 610; a right of drain for houses; *Nicholas v. Chamberlain*, 1 Cro. Jac. 121; a right of ferry; *Trustees v. Campbell*, 6 Pat. App. (Sc.) 417; *McRoberts v. Washburn*, 10 Minn. 23, or any special privilege conferred by the legislature or acquired by prescription. As to erect a toll gate; *Croton*, etc., *v. Ryder*, 1 Johns. Ch. (N. Y.) 611; a toll bridge; *Chenango Bridge Co. v. Binghamton Br. Co.*, 27 N. Y. 77; *U. S. Sup. Ct.*, 5 Am. Law Reg. (N. S.) 424; *Hartford*, etc., *v. E. Hartford*, etc., 16 Conn. 149; a railroad; *Newburgh v. Miller*, 5 Johns. Ch. (N. Y.) 101; *Boston R. R. Co. v. Salem*, etc., *R. R. Co.*, 2 Gray (Mass.), 1; a market; *Anonymous*, 2 Vesey, 414; a right to use

SEC. 774. There is a broad distinction between an injury to a *right* incident to property, and an injury to property itself. For the violation of a right *incident* to property, no correct estimate of damages can ever be made. Its value is dependent upon a variety of circumstances and conditions, and upon the tastes, necessities, or peculiar notions of individuals. Being a mere incident to the estate, and having no tangible form, no visible existence, an injury thereto is incapable of estimation or compensation in damages. But an injury to property itself stands upon a different ground. Property, to which a right is incident, has a visible, tangible existence. It has a market value which is susceptible of estimation, and may be definitely fixed. An injury thereto is capable of estimation. It can be seen, and the extent of the mischief done can be measured with some degree of precision, and a fair and reasonable compensation awarded. But where a *right* is injured, no just or adequate measure of damages can be arrived at. It may, or it may not be, of present special value; it may or it may not be of considerable prospective value; in either case, a jury will seldom give more than nominal damages for its violation, which is utterly inadequate to protect the right. In cases therefore of actual, tangible injuries to property itself, either by an act of trespass or nuisance, which is susceptible of fair and reasonable compensation in damages, and the repetition of which, as a continuous or permanent injury, is not threatened, a court of equity will usually leave the parties to their remedy at law, but in the case of an injury to a *right*, that is a *substantial right* of property, which, as has heretofore been explained, is an incident of real property belonging or annexed to it, either as a natural incident, or by grant or prescription, where the right is clear, and the nuisance established, *an injunction will always be granted* to protect the right, as well as to prevent irre-

water for a mill; *Corning v. Troy, etc.*, 40 N. Y. 160; a right to pollute water acquired by grant or prescription by turning in the refuse water from a mill; *Crossley v. Lightowler*, 3 L. R. Eq. 279; a right to a particular use of another's land acquired by grant or long user; *Gurney v. Ford*, 2 Allen (Mass.), 556. But a mere convenience not existing as a legal right, as a right of prospect; *Aldred's Case*, 9 Coke, 58; *Butt v. Gas*

Co., 2 L. R. Ch. 158; the preservation of privacy; *Jones v. Tapling*, 12 C. B. (N. S.) 843; or to have no disagreeable erections made near one's premises; *Attorney General v. Doughty*, 2 Ves. 453; *Ross v. Butler*, 19 N. J. 294; are not substantial rights, unless made so by express grant made by one having, at the time of the making thereof, the power to impose such restrictions upon the adjoining estates.

parable injury.¹ To refuse an injunction after the right and nuisance are completely established, except for some misconduct of the party applying therefor, would be contrary to equity and good conscience, as well as contrary to every well-considered case. In such a case no *actual pecuniary damage* need be proved, the law imports damage to support the right,² and when the right and its violation by a continuous or threatened act is established, an injunction may fairly be said to be a matter of right.³

SEC. 775. There is another matter which should be noticed here as it is the subject of much confusion, and often misleads both parties and courts, and that is, the distinction between injury and damage. It is usually supposed that they must both concur in a given case in order to uphold an action either at law or in equity, but in the sense in which it is ordinarily understood this is a serious mistake. There may be, and often are, cases where actions are upheld, when there is injury without damage,⁴

¹ *Shields v. Arndt*, 3 Green's Ch. (N. J.) 234; *Holsman v. Boiling Spring, etc.*, Co., 1 McCarter (N. J.), 234; *Carlisle v. Cooper*, 21 N. J. 582.

² *Clowes v. North Staffordshire Potteries Co.*, 8 L. R. Ch. 125; *Ashby v. White*, Ld. Rayd. 1028, Lord Holt's opinion; *Webb v. Portland Mfg. Co.*, 3 Sum. (U. S.)

³ *Holsman v. Boiling Springs Co.*, ante. The trivial amount of damage already sustained is no reason why an injunction should be denied when the act complained of might ripen into a right. *Corning v. Nail Co.*, 34 Barb. (N. Y.) 485; *Wright v. Moore*, 38 Ala. 593. Continual diversion of water is irreparable mischief. *Tuolumne Water Co. v. Chapman*, 8 Cal. 392; *In Rochdale Canal Co. v. King*, 21 Law & Eq. 177, the defendant only had the right to use water for condensing purposes. He used it for other purposes, and in a court of law the plaintiff had a verdict for 8s. damages. Held, that although the damages were merely nominal, an injunction should issue, and the defendant was restrained. *Green v. Oakes*, 17 Ill. 249; *Rabley v. Welch*, 23 Cal. 452; *Brock v. R. R. Co.*, 35 Vt. 373; *Cusminger v. McIntire*, 23 Cal. 593; *Natona, etc., Co. v. McCay*, id. 490; *Phenix, etc. Co. v. Fletcher*, id. 481; *Dickenson v. Grand Junction Canal Co.*, 19 Eng.

Law & Eq. 287. Equity will interfere in a case of nuisance as in trespass, when the damages are of such a character as not to be susceptible of proof, as in such a case the injury is irreparable. *Pike Co. v. Plank Road Co.*, 11 Ga. 246. Whether damage is irreparable or not, is a question of law. Id.

⁴ *Webb v. Portland Manufacturing Co.*, 3 Sum. (U. S.) 334; *Wilts, etc., v. Swinton Waterworks Co.*, 9 L. R. Ch. 451; *Ballou v. Inhabitants, etc.*, 4 Gray (Mass.), 324; *Knight Bruce in Attorney-General v. Sheffield Gas Co.*, 19 Eng. Law & Eq. 659; *Clowes v. Potteries Co.*, 8 L. R. Ch. 125; *Goodson v. Richardson*, 9 id. 221; *Bassett v. Company*, 43 N. H. 534; 28 id. 434; *Wood v. Waud*, 3 Exchq. 748; *Boliver Manufacturing Co. v. Neponset*, 16 Pick. (Mass.) 212; *Gardner v. Newburgh*, 2 Johns. Ch. (N. Y.) 165; *Hammond v. Fuller*, 1 Paige's Ch. (N. Y.) 197; *Reid v. Gifford*, 1 Hopkins' Ch. (N. Y.) 416; *Arthur v. Case*, 1 Paige's Ch. (N. Y.) 448; *Van Bergen v. Van Bergen*, 2 Johns. Ch. (N. Y.) 272; S. C., 3 id. 282; *White v. Forbes*, Walker (Mich.), 112; *Bemis v. Upham*, 13 Pick. (Mass.) 169; *Miller v. Truehart*, 4 Leigh (Va.), 567; *Blanchard v. Baker*, 8 Greenl. (Me.) 253; *Ripka v. Sargent*, 7 W. & S. (Penn.) 9; *Parker v. Griswold*, 17 Conn. 288; *Alexander v. Kerr*, 2 Rawle (Penn.), 83.

when there is a *legal injury* which results in positive pecuniary benefit to the person bringing the action.¹ A *legal injury* is something done against the right of another, against his will, and without authority. This is an injury to his right of dominion over his property, and it is in no measure a defense that others are injuring his right in the same way,² nor that the act produces no actual damage, but, upon the contrary, results in a positive benefit to his property.³ The reason for this is, that a man's right of dominion over his own property must not be disturbed. Every man must be left to do what he will with his own, so long as he keeps within the scope of his legal rights, and this right of dominion, this right to deal with his own property as he will, is a sacred right, and one which is upheld by the very necessity of things, and finds support in the soundest public policy. It is a necessary adjunct of property, and in accordance with the dictates of the highest civilization and enlightenment. Without it, the wildest chaos and confusion would ensue, and property itself would be left to the caprices and whims of others, without stability, security or value. Thus it is, that in all ages of the world, courts have, with a strong hand, upheld this right of absolute legal dominion of one over his own property, and have guarded it from invasion with the most jealous care. Whatever invades this right is a *legal injury*, whether damage ensues or not.⁴ It is a *right*, for the violation of which the law "imports damage to support the right," and courts of equity have *always* interposed, in a proper case, to protect this right, without any reference to the question of *actual damage*, the motive which instigated the party to invoke its aid, or the benefits that he derives from the act.⁵ In such cases, the question is not one of damage on the one hand or benefit on the other, but simply whether a right has been violated by a wrongful act. These points being established and the party himself being without fault an injunction is never denied.⁶

¹ Francis v. Schoellkopf, 52 N. Y. 156; Gile v. Stevens, 13 Gray (Mass.), 146.

² Wood v. Waud, 3 Exchq. 748; Crossley v. Lightowler, 3 L.R. Ch. 406; McKeon v. See, 4 Robt. (N. Y.) 449.

³ Gile v. Stevens, ante; Holsman v. Boiling Springs Co., 1 McCarter (N. J.), 343.

⁴ Barnes v. Hathorn, 54 Me. 124.

⁵ Goodson v. Richardson, 9 L. R. Ch. 221.

⁶ Hack Improvement Co. v. R. R. Co., 22 N. J. 94. When the right is clear and the injury established an injunction issues as a matter of course. Duncan v. Hayes, 22 N. J. 25; Davidson v. Isham, 1 Stockt. (N. J.) 186.

SEC. 776. Damage, in its legal sense, is synonymous with compensation. Not necessarily compensation for an injury *done* to another, but compensation for something done by another which ought not to have been done, or for neglecting to do something which ought to have been done. It may be said to be a complex term, which imports both injury *and* compensation. That is, legal injury, and compensation measured by the law. Its usual signification as a legal term is the measure of compensation which should be given by one to another for something done or omitted to be done, which it was the legal duty of the person giving it, to do, or not to do. It can only be efficacious, compensably, when it can be fairly applied as a true and just measure of the injury done. If the injury to which it is applied is not susceptible of pecuniary estimation, it can in no just sense be said to be a compensation for the injury, unless it operates to prevent the wrong and tends to place the parties in *statu quo*. This is seldom accomplished in a case of a mere injury to a right, therefore, courts of equity, while they sometimes require that the rights of the parties shall be settled at law before invoking their aid to stop the wrong, do not regard the smallness of the damage given, or even the fact that no damage at all is given, as decisive of the question whether their interposition should be exercised or withheld, but simply whether the right and its invasion have been established. If so, the question then arising is, are the damages given such as will afford adequate redress for the wrong, and protection against its repetition? It will, therefore, at once be seen that if the right is established, and *no* damages given, or if only merely nominal damages are given, the adequacy of the legal remedy has failed, and the very best reason is furnished for equitable interference.¹ But

¹ *Clowes v. Potteries, etc., Co.*, 8 L. R. Ch. 125; *Wood v. Sutcliffe*, 8 Eng. Law & Eq. 222; *People v. Third Av. R. R. Co.*, 45 Barb. (N. Y.) 63.

In *Ried v. Gifford, Hopkins' Ch.* (N. Y.) 416, which was an action for an injunction to restrain the diversion of water, the court held that in all cases of a mere injury to a right, a court of equity would interfere by injunction without sending the party to a court of law to have his right settled there,

and the reason given by the court was, that in the case of an interference with a right, a court of law could not afford adequate redress.

In *Webber v. Gage*, 39 N. H. 182, the court held that in all cases where the injury is irreparable and not adequately compensable in damages, or is such as in its nature must occasion a constantly recurring grievance, which cannot be otherwise prevented, or where loss of health, trade, business

upon the other hand if the right is established and large damages are given, which are a fair and adequate compensation for the injury, the adequacy of the legal remedy is established, and a

or the destruction of the means of subsistence, or permanent injury to property or substantial rights therein would ensue, *or when an easement or servitude is annexed to an estate by grant, covenant or otherwise, a court of equity will interfere in furtherance of violated justice and the violated rights of the party or to protect the due and quiet enjoyment of the easement against encroachment.*

In *Webb v. Portland Manufacturing Co.*, 3 Sum. (U.S.) 334, STORY, J., placed equitable interference against the infringement of rights incident to an estate, where no actual damage ensued, upon the broad ground of protection to rights, for the evil action of which no adequate redress could ever be had at law, and he quoted with approbation the saying of Lord HOLT in *Ashby v. White*, 1 Ld. Rayd. 928, that "for every injury to a right, the law imports damage to support the right." See page 338, ante.

And it may be safely asserted, that this is the uniform doctrine of the courts in all cases for injuries to a right, where the *right* and the *injury* are clearly established.

In *Bassett v. Company*, 47 N. H. 224, the plaintiff brought his bill to restrain the defendants from flooding his land by means of a mill-dam. The land injured was swamp land, and unfit for the purposes of cultivation. He brought his action at law which was tried six times; four times without an agreement of the jury, once with a verdict for the plaintiff for *one cent* damages, and the last time with a verdict for the defendant; upon application for an injunction, the court recognized the broad doctrine that, for an injury to a right, however small the injury, or even though there was no real injury, the plaintiff would be entitled to an injunction; but in that case it was refused, because the plaintiff by acquiescence had estopped himself from asking equitable interference. From the reasoning of the court it is evident that except for the misconduct of the plaintiff, he would have had an injunction.

That the courts regard the question of *rights* as superior to the question of *damages*, is evident from *all* the cases. Thus in *Baldwin v. Buffalo*, 29 Barb. (N. Y.) 396, the court restrained the defendant by *perpetual* injunction from entering upon the lands of the plaintiff and taking possession thereof, and opening and grading a street, by proceedings regular in form, but where it appeared by extrinsic evidence that the commissioners only awarded *one* dollar damages, for lands worth *twelve* dollars. But where the right or its violation is doubtful, equity will not enjoin until the questions have been settled, but will leave the defendant to go on at his peril. See also *Wilder v. Strickland*, 2 Jones (N. C.), 386; *Dumesnil v. Dupont*, 18 B. Mun. (Ky.) 800; *Laughlin v. Lamasco*, 6 Ind. 223; *Cunningham v. Rice*, 28 Ga. 30.

In California in the case of *Weimer v. Lowrey*, 11 Cal. 104, where the defendant dug a ditch through the plaintiff's land before the plaintiff came into possession and without his consent, and it appearing that the ditch interfered with the comfortable enjoyment of the property, the nuisance was abated by mandatory injunction. See, also, *Bensley v. Mountain Lake Co.*, 13 Cal. 306, for instances where injunction will issue when compensable in damages, but the party inflicting the injury is insolvent. Also, *United States v. Parrott*, 1 McAll. C. C. (Cal.) 271; *Gause v. Perkins*, 3 Jones' Eq. (N. C.) 177; *Thomas v. James*, 23 Ala. 723; *James v. Dixon*, 20 Miss. 79.

In *Tuolumne Water Co. v. Chapman*, 8 Cal. 392, it was held that the continuous diversion of a water-course is such a case of irreparable injury as equity will enjoin. See *Milhan v. Sharp*, 28 Barb. (N. Y.) 228, for instances of irreparable mischief. Also *Roman v. Strauss*, 10 Md. 89, where a person was enjoined from erecting a building so as to injure the plaintiff's right of way. See, also, *Sprague v. Rhodes*, 4 R. I. 301, where the question arose in reference to an injury to a water-course. Also *Ramsay v. Chandler*, 3 Cal. 90; *Middleton v. Franklin*, 3 id. 238; *Cen-*

court of equity will not interfere, unless the injury is still going on, and it is apparent that a multitude of suits would be the result.¹

SEC. 777. It is not necessary that the right should first be established at law, as, if the right is clear, and its violation established, an injunction will be granted, if the nature of the injury is such as would warrant an injunction after verdict.² But an issue may be made to a jury by either party, or the court may direct it of its own motion.³ When the right has not been first established in a court of law, the plaintiff must show that he has sustained, or will sustain such a substantial injury by the acts of the defendant as would entitle him to some damages in an action at law, although his failure to recover damages there is not decisive.⁴ But an action at law may often be sustained when a court of equity will not grant relief.⁵ As where a party seeking the

tral Bridge v. Lowell, 6 Gray (Mass.), 474; Green v. Oakes, 17 Ill. 249; Walker v. Shepardson, 2 Wis. 384.

In Com. v. Pittsburgh R. R. Co., 24 Penn. St. 159, the defendant was restrained from encroaching upon a canal belonging to the State, contrary to its authority, without reference to the question whether damage would ensue or not.

For instances of irreparable mischief against which equity will enjoin see Works v. Junction R. R. Co., 5 McLean (U. S.), 425, where it was held that it need not be shown *how much* damage one would sustain from a nuisance, but that if the right and its violation were shown, an injunction would issue to protect the right, upon the ground that such an injury was not capable of estimation in damages.

So in Burden v. Stein, 27 Ala. 104, which was an application for an injunction to restrain the diversion of water from a mill, it was held a proper case for an injunction, the right being clear, and its violation established, without reference to the question of damage.

See, also, Clark v. White, 2 Swan (Tenn.), 540, where it was held that equity would interfere by injunction in all cases of private nuisance where it operated as a continuous, or often recurring grievance, irrespective of the question of damage.

The ground of equitable interference to restrain nuisances to water rights, is well stated in Burnham v. Kempton, 44 N. H. 78, which is a well considered case, and one which will repay careful examination.

See, also, Ripley v. Welch, 23 Cal. 452, which is also a case that was placed upon true grounds. Also Parrish v. Stephens, 1 Oregon, 73.

See Stein v. Burden, 24 Ala. 130, for instances where recovery at law may be had without proof of actual damage. In the case of the diversion of water, a recovery may be had even though there is no mill. Stein v. Ashley, 24 Ala. 521, reaffirming the doctrine of Stein v. Burden, ante.

¹ Parker v. Winnepisseogee Co., 2 Black (U. S.), 551; Attorney-General v. Nicholl, 16 Ves. 342; The Fishmongers' Co. v. The East India Co., 1 Dick. 163.

² Morris v. Berkley, 2 Ves. Sr. 453.

³ Crowder v. Tinkler, 19 Ves. 617; Humphries v. Blevins, 1 Overton (Tenn.), 36; Key v. Nott, 9 H. & J. (Md.) 342; Schneider v. Shrubsdale, 4 D. G. F. & J. 52.

⁴ Elmhirst v. Spencer, 2 Mac. & G. 60.

⁵ Parker v. Winnepisseogee Manufacturing Co., 2 Black (U. S.), 545.

injunction has by *laches*, or his own acts, done that which amounts to an equitable estoppel, and thus deprived himself of the right to ask equitable relief.¹ As where he has encouraged the nuisance and allowed the party to go on and make heavy expenditures under the reasonable belief that he would make no objections to the exercise of the trade,² or where he has given the defendant a license to do the act complained of, and has not revoked the license, or, where the damages are small and the injury not of a continuous or permanent nature.³

Where a party has slept upon his rights, as when the nuisance has been going on with equal injury, for several years, an injunction will generally not be issued until the right is established at a final hearing.

Thus, in *Atlanta v. Georgia R. R. Co.*, 40 Ga., 471 the nuisance had been in existence for over twenty years before the plaintiffs moved for an injunction. The court held that the case presented no such instance "of intolerable nuisance and pressing necessity" as entitled a party who had borne with a nuisance so long, to a preliminary injunction, and left the parties in *statu quo* until a hearing could be had upon the merits. But a mere delay of several months will not deprive a party of his remedy by preliminary injunction, when the delay is satisfactorily explained.⁴

¹ *Jones v. The Royal Canal Co.*, 1 My. & Cr. 549; *Tash v. Adams*, 10 Cush. (Mass.) 253; *Lord Cawdor v. Lewis*, 1 Younge & Collier, 427; *Whitney v. Union, etc.*, 11 Gray (Mass.), 359; *The Case of the Water-course*, 2 Eq. Cases Abr. 522, pl. 2; *Grey v. R. R. Co.*, 1 Grant (Penn.), 412; *Burden v. Stein*, 27 Ala. 104; *Attorney-General v. Sheffield Gas Co.*, 19 Eng. Law & Eq. 637; *Williams et al. v. The Earl of Jersey*, Cr. & Phil. 92; *Short v. Taylor*, 2 Eq. Cas. Abr. 522; *Nicholson v. Hooper*, 4 My. & Cr. 179; *Gerard v. O'Reilly*, 2 Conn. 165.

² *Tash v. Adams*, ante; *Bankhardt v. Houghton*, 27 Beav. 425; *Williams v. The Earl of Jersey*, 1 Cr. & Ph. 92.

³ *Wood v. Sutcliffe*, 8 Eng. Law & Eq. 217; 2 Sim. (U. S.) 169; *Rigby v.*

Gt. Western Railway Co., 2 Ph. 50; *Attorney-General v. Sheffield Gas Co.*, ante.

⁴ *Meigs v. Lester*, 23 N. J. 199. Nor will mere delay, unless it amounts to such an acquiescence as amounts to an equitable estoppel, deprive a party of his remedy by injunction, although it is a delay of several years. *Carlisle v. Cooper*, 21 N. J. 576. But if a party has slept upon his rights, and allowed another to go on, from time to time, and make large expenditures in the business complained of without protest or objection, his equitable rights are lost, and no injunction will be granted. *Attorney-General v. R. R. Co.*, 24 N. J. 49. As to the effect of a license, see cases cited, pp. 349, 350, 351 and 353, ante.

SEC. 778. The jurisdiction of a court of equity over cases of private nuisance is now well established,¹ and in a proper case for equitable interference it will assume and take jurisdiction and give the party all the relief to which he is entitled, even to the settlement of damages.² But, in order to entitle a party to equitable relief, his right must be clear,³ and the injury established⁴ as in doubtful cases, the party will be turned over to his legal remedy.⁵ In cases where the bill shows that the danger is imminent, or the injury if allowed to go on will be destructive to the plaintiff's rights, the courts will retain the injunction until after the rights are settled, even though they turn the party over to his remedy at law.⁶ If the right is established at law, and the remedy proves inadequate, equity will relieve,⁷ and in a strong case, where the injury is of a grievous character, as injurious to health,⁸ destructive of the comfortable enjoyment of property,⁹ or an act which if continued will operate to destroy a substantial right, equity will interfere by injunction to prevent a repetition of the nuisance, even though its use for the purpose complained of has stopped since the verdict at law.¹⁰

SEC. 779. The fact that the party has a legal remedy is not the point; the question is, whether, under all the circumstances of the case, his legal remedy is adequate to redress the particular injury complained of. If so, equity will not interfere, except in special cases. But if the legal remedy does not afford that relief to which the party in equity and good conscience is entitled, the smallness of the damage on the one hand, or the magnitude of the interest to be affected on the other, will not prevent the exer-

¹ SWAYNE, J., in *Parker v. Winne-
pisogee Co.*, 2 Black (U. S.), 551; *Lake
Co. v. Worster*, 29 N. H. 438; *Hodg-
man v. Richards*, 45 id. 30; *Dover v.
Portsmouth Br. Co.*, 17 id. 200; *Burn-
ham v. Kempton*, 44 id. 79; *Webber v.
Gage*, 37 id. 186.

² *Bassett v. Company*, 43 N. H. 249;
Dumett v. Dumett, id. 499.

³ *Shields v. Arndt*, 3 Green's Ch. (N.
J.) 234; *Ross v. Butler*, 19 N. J. 294;
Duncan v. Hayes, 22 id. 25.

⁴ *Hack Improvement Co. v. R. R.
Co.*, 22 N. J. 94.

⁵ *Hilton v. The Earl of Granville*,
C. & Ph. 284.

⁶ *Bacon v. Jones*, 4 My. & Cr. 438;
Sprague v. Steere, 1 Angell (R. I.) 247.

⁷ *Olmstead v. Loomis*, 6 Barb. (N.
Y.) 152. In New York since the Code,
and courts of law and equity are
practically amalgamated, a party can
have his rights settled in equity, how-
ever doubtful.

⁸ *Attorney-General v. Nicholl*, 16
Vesey, 342.

⁹ *Walter v. Selfe*, 4 Eng. Law & Eq.
20.

¹⁰ *Peck v. Elder*, 3 Sandf. (N. Y.)
126.

cise of the preventive power of the court.¹ Indeed, it was remarked in one case by an eminent jurist, whose opinions are entitled to great weight: "Even slight infringements of rights, by a large company of persons, ought to be watched with a careful eye, and repressed with a strict hand by a court of equity, where it can exercise jurisdiction." It is proper to say, that this remark, so pregnant with justice, and so keenly cognizant and regardful of small rights, has since been recognized by the English courts, as the correct embodiment of equitable policy.²

SEC. 780. But it should be remembered, that in order to warrant the interposition of a court of equity, ordinarily, a substantial right of property must be affected by the nuisance, and the injury be of such a character as to support an action at law.³ Indeed, while the courts ordinarily will not require the party to establish his right at law before seeking equitable relief, yet they *do* require that he should by his bill show conclusively that a legal right has been violated, which would entitle him to a verdict at law, and that the injury is of such a character, that a court of law could afford no adequate redress, *or* it must be a nuisance which seriously affects the comfortable enjoyment of property, as by the exercise of a noisy, noxious trade,⁴ or which is of such a character, that delay would be destructive of material interests.⁵ The bill must always show the nature and character of the right injured, and the nature and extent of the injury inflicted, and, unless it appears from the bill

¹ KNIGHT BRUCE, L. J., Attorney-General *v.* The Sheffield Gas Co., 19 Eng. Law & Eq. 657.

² In a recent case in the court of chancery appeals (*Goodson v. Richardson*, 9 L. R. (Ch. App.) 221), a mandatory injunction was granted compelling the defendant to remove water-pipes laid by the defendant, in the highway in front of the plaintiff's premises, of which the plaintiff was the owner of the fee. The court held that the fact that the soil under the highway was of no value to the plaintiff, and that his motive in bringing his bill was not connected with the enjoyment of his land, offered no reason against granting the injunction.

The ground upon which the court predicated its action was, that the defendant, by laying the water-pipes in the plaintiff's soil, had violated his right, and that, while the present damage was nothing, yet, if continued for the statutory period, a servitude would be imposed upon the plaintiff's estate. *Clowes v. N. Staffordshire R. R. Co.*, 8 L. R. Ch. App. 125; *Wilts v. Swinton Water-works Co.*, 9 id. 451.

³ *Clowes v. Potteries Co.*, 8 L. R. Ch. 125.

⁴ *Cleaveland v. Gas-light Co.*, 20 N. J. 201; *Dennis v. Eckhardt*, 54 Penn. St. 224.

⁵ *Weir v. Kirk*, 74 Penn. St. 274.

that the party would be entitled to a verdict at, and that no adequate redress could be obtained in, a court of law, the party will be turned over to his legal remedy.¹

SEC. 781. The real question, and the real test by which to determine whether an injunction should be granted or not, is, whether, under all the circumstances of the case, the plaintiff ought to be required to submit to the injury complained of.² In determining this question, regard must be had to the nature of the right, and the character of the injury.³ If the injury is an invasion of property in the nature of a continuing trespass,⁴ or if it is of such a character that, if long continued, a right will be acquired as against the plaintiff's estate, to continue the wrong, and an action at law will not operate to prevent a continuance of the injury, and the plaintiff has been guilty of no *laches*, or of such conduct as in equity estops him from seeking equitable interference, there can be no question that, by all the better class of authorities, he is entitled to an injunction, even though the damages are merely nominal in a pecuniary point of view.⁵

SEC. 782. It is sometimes said that "mere inconvenience" resulting from an act, does not constitute that act a nuisance. This is not true in its largest sense, but is true in a special sense. Where a person by an *unlawful* act deprives a person of a mere convenience, as access to his premises⁶ or any mere convenience that exists as a legal right, that act is, and always has been regarded as an actionable nuisance, even though of small importance.⁷ But the interference with a mere convenience that the party does

¹ *Theibault v. Conover*, 11 Fla. 174; *Adams v. Michael*, 38 Md. 123; *Attorney-General v. Steward*, 20 N. J. 415; *Ross v. Butler*, 19 id. 294; *Duncan v. Hayes*, 22 id. 25.

² *Lloyd v. R. R. Co.*, 2 D. J. & S. 568; *Lewin v. Lewis*, 4 M. & C. 254; *Attorney-General v. Sheffield Gas Co.*, 19 E. L. & E. 657, opinion of KNIGHT BRUCE; *Goodson v. Richardson*, 9 L. R. Ch. App. 221; *Wandsworth Board of Works v. London, etc., R. R. Co.*, 31 L. J. (Ch.) 854; *Walter v. Selfe*, 4 Eng. Law & Eq. 20.

³ *Doellner v. Tynan*, 38 How. Pr. (N. Y.) 176; *Gilbert v. Showerman*, 23 Mich. 163.

⁴ *Mississippi, etc. R. R. Co. v. Ward*, 2 Black (U. S.), 485.

⁵ *Webb v. Portland Manufacturing Co.*, 3 Sum. (U. S.) 334.

⁶ *Attorney-General v. Boyl*, 10 Jur. (N. S.) 307; *Daniel v. Anderson*, 31 L. J. Ch. 610; *Shipley v. Capes*, 17 Md. 179.

⁷ *Webber v. Gage*, 39 N. H. 182.

not hold as a legal right, as the hiding of a prospect¹ or the cutting off of a convenient access to his premises, that is not an incident of the estate, is not a nuisance.² Therefore, in determining the question as to whether depriving a person of a "mere convenience" is a nuisance or not, regard must always be had to the *right* by which that convenience is held or exercised. If it is a *legal* right incident to the estate, whether a natural or acquired incident, so that it is annexed to the estate or legally vests in its occupant, an interference therewith is a nuisance, actionable at law, or relievable in equity.³

So too, while the diminution of the value of property by a *lawful* act will not make the act a nuisance, yet mere diminution of the value of property from an *unlawful* act *will* be sufficient to make the act occasioning it a nuisance. Therefore, when it is said that mere diminution of the value of property does not create a nuisance, it is meant that a person exercising an act strictly lawful, and in no sense a nuisance, except as it, by its proximity to certain property, renders that property less valuable in market, cannot therefore be regarded as a nuisance,⁴ but if the use of property producing that result is in any sense a nuisance, as by sending forth noxious smells,⁵ smoke,⁶ noxious vapors,⁷ or by producing disagreeable noises,⁸ or varying and agitating sounds,⁹ or is productive of any of the results fairly within the idea of a nuisance, diminution in the value of property as a result thereof, is clearly an important element for which a recovery may be had.¹⁰

SEC. 783. Any person injuriously affected by a nuisance who could maintain an action at law therefor, can maintain a bill in equity for an injunction. But, unless he could maintain an action in a court of law he cannot maintain a bill, therefore, in determining the right of a party to proceed in equity for redress by injunction against a nuisance, either public or private, regard

¹ Butt v. Imperial Gas Co., 2 L. R. Ch. 158.

² McGee v. R. R. Co., 6 Grant, 116, 117.

³ Webber v. Gage, ante.

⁴ Ross v. Butler, 19 N. J. 294.

⁵ Peck v. Elder, 3 Sand. (N. Y.) 126.

⁶ Adams v. Michael, 38 Md. 125.

⁷ Salvin v. North Brancepeth Coal Co., 31 L. T. (N. S.) 156.

⁸ Dennis v. Eckhardt, 54 Penn. St. 204.

⁹ McKeon v. See, 4 Robt. (N. Y.) 449; 51 N. Y.

¹⁰ Barnes v. Hathorn, 54 Me. 127;

Thiebault v. Conover, 11 Fla. 174;

Peck v. Elder, 3 Sand. (N. Y.) 126;

Dana v. Valentine, 5 Met. (Mass.) 8.

must be had to his right to maintain an action in a court of law. Where several persons are injured by a common nuisance, although varying in degree but having a common effect, they may join in a bill for an injunction, but there can be no recovery of damages.¹

SEC. 784. When a court of equity exercises original jurisdiction over a nuisance, under a bill brought for an injunction, it will settle all the right of the parties, even to the assessment of the damages resulting therefrom.²

SEC. 785. The jurisdiction of a court of equity over nuisances is concurrent with the jurisdiction of a court of law.³ It will entertain complete jurisdiction in a proper case, where the bill and the proof makes a proper case for equitable relief, or will entertain a bill in aid of a court of law when an action to settle the rights of the parties is pending there, when the bill shows such a case of irreparable mischief as makes it proper to have the nuisance stopped until the rights of the parties are determined.⁴ This species of injunction is called interlocutory, simply staying the nuisance during the pendency of litigation,⁵ and is often issued as much for the protection of the rights of the defendant as of the plaintiff.⁶ They are generally issued only when the right is clear, the nuisance certain, and the injury immediate or irreparable,⁷ or to prevent remote and contingent damage in certain cases.⁸

SEC. 786. Perpetual injunctions are injunctions issued after a final determination of the question involved, and operate as a perpetual restraint upon all the proper parties thereto against perpetrating or repeating the acts therein forbidden.⁹

¹ *Brady v. Weeks*, 3 Barb. (N. Y.) 156; *Peck v. Elder*, 3 Sandf. (N. Y.) 126.

² *Bassett v. Company*, 43 N. H. 249; *Dunnett v. Dunnett*, id. 499.

³ *Gardner v. Newburgh*, 2 Johns. Ch. (N. Y.) 162; *Parker v. Winnepiseogee*, etc., Co., 2 Black (U. S.), 415.

⁴ *Lister v. Leather*, 3 Jur. (N. S.) 433; *Blackmore v. R. R. Co.*, 1 M. & K. 154; *Bacon v. Jones*, 4 M. & C. 436; *Eaden v. Firth*, 1 H. & M. 573.

⁵ *Farmer, etc., v. Reno*, 53 Penn. St. 224; *Murdock's Case*, 2 Bland. (Md.) 461.

⁶ *Harman v. Jones*, 1 Cr. & Ph. 299; *Morris v. Prudden*, 20 N. J. 530.

⁷ *Mammoth Vein Co.'s Appeal*, 54 Penn. St. 183.

⁸ *Lowndes v. Booth*, 33 L. J. Ch. 493.

⁹ *Chapman v. Harrison*, 4 Rand. (Va.) 336; *High on Injunctions*, 4.

Mandatory injunctions are often issued by the courts where the case renders that species of injunction proper, and are in the nature of an order directing a restoration of things to their former condition, or directing certain things to be done which the equities of the case and the legal rights of the parties warrant.¹ Formerly the exercise of this jurisdiction was doubted, but now it is regarded as a well-settled power incident to a court of equity.²

This power, however, is exercised with great caution, and only in instances where the injury from a continuance of the nuisance would be serious, or the injury is of such a character that real and substantial justice requires that the parties should be put in "*statu quo*."

SEC. 787. Bills for an injunction and for damages resulting therefrom may be brought against any party who is aiding or abetting therein, or who in any measure upholds the same, and

¹ *Martyr v. Lawrence*, 2 DeG. J. & S. 261; *Garretson v. Cole*, 1 H. & J. (Md.) 370.

² Mandatory injunctions are orders issued out of a court of equity to compel a party to do or not to do that which the obvious equities of the case require. However much this power may heretofore have been doubted the courts now exercise it whenever required as a necessary incident to the power to place the parties where, in equity and good conscience, they ought to be. *Isenberg v. East India Co.*, 33 L. J. Ch. 392; *Deere v. Guest*, 1 My. & Cr. 516; *High on Injunctions*, 500; *Kerr on Injunctions*, 231, 232, 233, where the whole subject is ably and carefully reviewed. *Beadel v. Perry*, 3 L. R. Eq. 465; *Schwoer v. Boston Market*, 99 Mass. 285; *Coal Co. v. Lehigh Coal and Nav. Co.*, 50 Penn. St. 91; *Rogers' Machine Works v. R. R. Co.*, 20 N. J. 387; *Sears v. Boston*, 16 Pick. (Mass.) 357; *Pierce v. New Orleans*, 18 La. An. 242; *Burrell v. Prichard*, 1 L. R. Ch. App. 244; *Goodson v. Richardson*, 9 id. 225; *Martin v. Headon*, 2 L. R. Eq. 425.

¹¹ In *Attorney-General v. Mid Kent R. R. Co.*, 3 L. R. Ch. App. 100, will be found a very full statement of the considerations that operate to induce

a court of equity to exercise this power. In this case the court held that the fact that a remedy existed at law by *mandamus*, did not oust the jurisdiction of the court, and that the injury was small, should not influence the exercise of its power, but that, as substantial justice required that the defendants should conform to the act under which they derived authority, the court would by mandatory order compel compliance therewith. In *Corning v. Troy Iron, etc., Factory*, 40 N. Y. 191, a mandatory injunction was issued to compel the restoration of waters diverted from a natural water-course by an artificial channel, and the court placed the issue of its mandatory order upon the ground of strict right and equity between the parties, and held that, while the order would operate disastrously to the defendants, and would be of but little advantage to the plaintiffs, yet, as it was the right of the plaintiffs to have the water flow in its natural channel, its diversion was wrongful, and its restoration a matter of strict equitable as well as legal right. *Cole Silver Mining Co. v. Virginia, etc., Water Power Co.*, 1 Sawyer (U. S. C. C.) 685; *Cambias v. Phila. R. R. Co.*, 4 Brewster (Penn.) 563.

in determining who should be made parties thereto, or rather who *may* be made parties, reference should be had to the *legal* liability of parties, for a bill in equity to restrain a nuisance only lies against those who, at law, would be liable to respond in damages.¹

SEC. 788. An injunction will be issued to prevent the creation of a nuisance, as well as to stop a nuisance already created,² but in such a case the character of the nuisance must be particularly set forth in the bill, as well as the character of the injury that will result therefrom.³ That is, such facts must be set up, and with such particularity, as clearly show that a nuisance will be created by the act sought to be enjoined, if it is allowed to go on.⁴ But where it is the *use* of a structure in process of erection that will create the nuisance, the erection of the structure will not be enjoined, but simply the use of it in the manner complained of.⁵ But when the structure itself will be a nuisance, as a shutting out the light and air from windows which the party has a right to have unobstructed,⁶ or where it cuts off access to one's premises by a way to which the party is legally entitled,⁷ or when the structure can only be used for the illegal purpose named in the bill, the erection itself will be enjoined.⁸ But to entitle a party to relief in such cases, a very strong case must be made by the bill, and sustained by the proof, as if, on coming in of the answer, the fact of contemplated nuisance is fully denied, or if, upon the facts, there is a reasonable doubt of the effect of the erection, the injunction will be denied until the question of nuisance is determined by the actual use of the property.⁹

SEC. 789. Injunctions against *threatened* nuisances will seldom be granted except in extreme cases where the threatened use of

¹ See Chapter on Remedies at Law.

² *Cleveland v. Citizens' Gas-light Co.*, 20 N. J. 201; *Wahle v. Reinbach*, 76 Ill. 322.

³ *Adams v. Michael*, 38 Md. 125.

⁴ *Thiebault v. Conover*, 11 Fla. 325.

⁵ *Cleveland v. Citizens Gas-light Co.*, 20 N. J. 201; *Attorney-General v. Steward*, id. 415.

⁶ *Gwyn v. Milmouth*, 1 Freem. (Ohio) 505.

⁷ *Stetson v. Faxon*, 19 Mass. 110.

⁸ *Cleveland v. Citizens Gas-light Co.*, ante.

⁹ *Attorney-General v. Steward*, 20 N. J. 415; *Cleveland v. Citizens Gas-light Co.*, id. 201; *Rhodes v. Dunbar*, 57 Penn. St. 294; *Adams v. Michael*, 38 Md. 125; *Ross v. Butler*, 19 N. J. 294; *Duncan v. Hayes*, 22 id. 23.

property is clearly shown to be such as leaves no doubt of its injurious results. The bill must set forth such a state of facts as leaves no room for doubt upon the question of nuisance, for if there is any doubt upon that point, the benefit of it will be given to the defendant.¹ A mere allegation of great and apprehended danger is not enough, facts must be stated that show it so.²

The general practice in reference to bills to restrain *threatened* nuisances, when the thing sought to be restrained is a *prima facie* nuisance, or when the bill sets forth facts that leave no doubt that the use of property complained of will be a nuisance, seems to be, upon coming in of the answer denying the nuisance, to dissolve the injunction and allow the defendant to go on at his peril until the final hearing, when, if the nuisance is established, a perpetual injunction is granted.³ But if the bill seeks to enjoin the erection of a building upon the ground that its use will be a nuisance, it must be alleged in the bill and proved upon the trial that the building itself will be a nuisance, and that it can be devoted to no use except such as will be productive of such

¹ Adams v. Michael, 38 Md. 125; Thiebault v. Conover, 11 Fla. 143; Cleveland v. Gas Co., 20 N. J. 201; Attorney-General v. Steward, 21 N. J. 415; Wolcott v. Mellick, 3 Stockt. (N. J.) 204; Davidson v. Isham, 1 id. 186; Clark v. Lawrence, 6 Jones' Eq. (N. C.), 83; St. James Church v. Arrington, 36 Ala. 546; Norwood v. Dickey, 18 Ga. 528; Wallace v. McVey, 6 Ind. 300; Rhodes v. Dunbar, 57 Penn. St. 274; Duncan v. Hayes, 22 N. J. 23; Laughlin v. President, etc., of Lamasco, 6 Ind. 223; Wilder v. Strickland, 2 Jones (N. C.) 386; Dunning v. Aurora, 40 Ill. 481; Silliman v. Hudson River Br. Co., 4 Blatchf. (C. C. U. S.) 395; Carpenter v. Cummings, 2 Phila. (Penn.) R. 74; Spencer v. Campbell, 9 W. & S. (Penn.) 32; Lake View v. Letz, 44 Ill. 81; Ross v. Butler, 19 N. J. 294; Branch Turnpike Co. v. Yuba, 13 Cal. 190; Parrish v. Stevens, 1 Or. 73; Brock v. Railroad Co., 35 Vt. 373; Kirkman v. Handy, 11 Hump. (Tenn.) 406; Penguin v. Anderson, 28 Ind. 79; Morris, etc., Co. v. Central Railroad Co., 1 Green (N. J.), 419; Lutheran Church v. Maschop, 2 Stockt. (N. J.) 57; Harrison v. Brooks, 20 Ga. 537.

In Dumesnil v. Dupont, 18 B. Monr. (Ky.) 800, an injunction was refused to restrain the erection of a powder house in a public place. But see Weir v. Kirk, 74 Penn. St. 225.

A court of equity looks at the material averments of a bill, and from them determines the true character and equitable rights of the parties. McConnell v. Gibson, 12 Ill. 128.

² Turnpike Co. v. Yuba, 13 Cal. 190; Waldron v. Marsh, 5 id. 119; Adams v. Michael, ante; Thiebault v. Conover, 11 Fla. 143; Duncan v. Hayes, 22 N. J. 23; Wolcott v. Mellick, 3 Stockt. (N. J.) 184; Ross v. Butler, 19 N. J. 294; Dumesnil v. Dupont, 18 B. Mon. (Ky.) 800; Carpenter v. Cummings, 2 Phila. (Penn.) 74; Rhodes v. Dunbar, 57 Penn. St. 274.

³ Rhodes v. Dunbar, 57 Penn. St. 274; Ross v. Butler, 19 N. J. 294; Sellers v. Pennsylvania R. R. Co. et al., Weekly Notes of Cases, vol. 1, p. 295; Meigs v. Lester, 22 N. J. 300; Babcock v. New Jersey Stock Yard Co., 20 id. 296; Dubois v. Budlong, 15 Abb. Pr. (N. S.) N. Y. 452; Peck v. Elder, 3 Sand. (N. Y.) 126; Howard v. Lee, id. 524; Butler v. Rogers, 1 Stockt. (N. J.) 487.

results.¹ Where it appears that the building can be devoted to other uses that are lawful, the erection of it will not be restrained, but its *use* for the purposes set forth in the bill, if clearly a nuisance, will be.²

But, the mere fact that the building is to be devoted to a use that has always proved a nuisance elsewhere, is by no means conclusive that it will be a nuisance in the instance charged in the bill. Therefore, the bill should set forth not only the use to which the building is to be devoted, but also the manner in which the building is to be used so far as known to the plaintiff, in order that the court may see whether, in the light of human experience, the particular use will be injurious. If the answer denies the nuisance and sets forth a peculiar method of use, the effects of which are unknown, the practice now seems to be, particularly in Scotland, and its justice commends itself to all courts, to temporarily dissolve the injunction and allow the experiment to be tried to determine whether an actual nuisance will result from the particular use in question.³

But if the erection will be a nuisance of itself, as because it is erected across a private way, or so as to deprive the plaintiff of some right or easement incident to his estate, or in violation of some right incident to the estate arising under contract, the erection itself will be enjoined. As when the plaintiff's grantor, at the time of the conveyance of the defendant's estate, imposed a restriction upon his grantee against the erection of buildings for any purpose that would be a nuisance,⁴ or against the erection of buildings upon a particular piece of ground whereby another's light or prospect would be impaired.⁵

SEC. 790. Great care should be observed in drawing complaints to restrain a threatened nuisance, to set forth fully and particu-

¹ *Cleveland v. Citizens Gas-light Co.*, 20 N. J. 201.

² *Cleveland v. Gas Co.*, ante; *Ross v. Butler*, 19 N. J. 294; *Rhodes v. Dunbar*, 57 Penn. St. 274; *Weir v. Kirk*, 74 id. 230; *Sellers v. Pennsylvania Railroad Co. et al.*, *Weekly Notes of Cases*, vol. 1, p. 297; *Brightman v. Bristol*, 65 Me. 436.

³ *Arnot v. Brown*, 1 Macph. (Sc.) 229; *Rhodes v. Dunbar*, 57 Penn. St. 274; *Howard v. Lee*, 3 Sandf. (N. Y.) 281; *Dubois v. Budlong*, 15 Abb. Pr. (N. S.)

N. Y. 452; *Allison v. Watt*, 4 F. (Sc.) 1068; *Trotter v. Farnie*, 5 W. S. (Sc.) 649; *Mutter v. Fife*, 21 Jur. (Sc.) 51; *Ross v. Butler*, 19 N. J. 294; *Cleveland v. Gas-light Co.*, 20 id. 201; *Sellers v. Railroad Co. et al.*, ante. See ante, 543, 544, 545 and 549.

⁴ *Haines v. Taylor*, 2 Ph. 209; *Elwell v. Crowther*, 81 Beav. 169.

⁵ *Palmer v. Paul*, 2 L. J. Ch. 154; *Railroad Co. v. Crossland*, 2 J. & H. 579.

larly its nature and character. In what the nuisance will consist, and the knowledge of the plaintiff as to the use in the manner described, as well as the nature and character of the injury that will result to the plaintiff therefrom.¹ These facts must not rest upon belief, but upon the actual knowledge of the plaintiff, which must be stated in the complaint, as well as the source from which it is derived.² A complaint resting upon information and belief is insufficient, as the court will give the defendant the benefit of all doubt unless the thing is in its nature a nuisance, or is a *prima facie* nuisance.³ If it is a use of property which may or may not become a nuisance, according to the circumstances and the manner of its use, unless the bill shows that the use will be such as to make it a nuisance, the injunction will be denied and the party left to his remedy, when the thing, by its use, becomes a nuisance.⁴

But it is generally good policy where there are strong reasons to believe that the thing will be a nuisance, to institute proceedings to stay its progress, particularly if its erection involves large expenditures, as in such cases the party cannot be charged with *laches*, nor can acquiescence in any measure be imputed to him, and the diligence used by instituting the proceedings, operating as a notice and protest against the use of the property in the manner contemplated, strengthen the plaintiff's equities when he asks for an injunction after the use of the property actually proves injurious.⁵

SEC. 791. The right to pure air is a natural right and is regarded as incident to land. Its sensible pollution by the exercise of a noxious trade whereby the comfortable enjoyment of property is diminished, is a nuisance, against which courts of equity will always, in proper cases, give relief.⁶ Slight pollution or such pollution thereof as is fairly incident to the ordinary use of prop-

¹ Thiebault v. Conover, 11 Fla. 225.

² Adams v. Michael, 38 Md. 125.

³ Cleveland v. Citizens Gas-light Co., 20 N. J. 201.

⁴ Ripon v. Herbert, 1 Cooper, 333; Spencer v. Railroad Co., 8 Sim. 192; Mohawk B. & Co. v. Railroad Co., 6 Paige's Ch. (N. Y.) 557; Attorney-Gen-

eral v. Cleaver, 18 Vesey, 212; Mayor, etc., v. Ball, 5 id. 563.

⁵ Rhodes v. Dunbar, 57 Penn. St. 274; Ross v. Butler, 19 N. J. 294; Attorney-General v. Stewart, 21 id. 224.

⁶ Tipping v. St. Helen Smelting Co., 6 B. & S. 604; Catlin v. Valentine, 9 Paige's Ch. (N. Y.) 574; Babcock v. New York Stock Yark Co., 20 N. J. 294.

erty, are not regarded as creating actionable injuries,¹ because, otherwise cities could not be built or business be carried on in large communities, but such interferences with its natural condition as are not fairly and reasonably incident to the ordinary use of property, that render the surrounding property physically uncomfortable by reason of the noxious mixtures communicated to it, is a nuisance for which an action will lie at law for damages, and in equity for an injunction and damages.²

SEC. 792. The production of mere inconvenience, resulting from the exercise of a trade, is not sufficient to constitute that trade a nuisance;³ neither is the fact that it renders the location less eligible as a place of residence for people who pay high rents, or are of "dainty modes and habits of living;"⁴ but the injury must be real and substantial, and such as impairs the ordinary enjoyment, *physically*, of the property within its sphere;⁵ not measured by the standard incident to a dainty and luxurious mode of living, but according "to plain and simple modes and habits" incident to persons of ordinary tastes and sensibilities.⁶

SEC. 793. Necessarily each case must stand upon its own special circumstances, and no definite rule can be given that is applicable in all cases, but when an appreciable interference with the ordinary enjoyment of property, physically, is clearly made out, as the result of a nuisance, a court of equity will never refuse to interfere, even though the actual injury resulting to the most injured is small, while the damage to the party complained of will be great by having his business stopped.⁷ Courts do not stop to balance conveniences⁸ if a substantial legal right is invaded by the unlawful exercise of a trade or use of property by another, the smallness of the damage on the one side, or its mag-

¹ Embrey v. Owen, 6 Exchq. 353; Walter v. Selfe, 4 Eng. L. & Eq. 15; Ross v. Butler, 19 N. J. 294.

² Huckenstine's Appeal, 70 Penn. St. 415; 10 Am. Rep. 170; Tipping v. St. Helen Smelting Co., 6 B. & S. 608.

³ Barnes v. Hathorn, 54 Me. 124.

⁴ Ross v. Butler, 19 N. J. 294; Walter v. Selfe, 4 Eng. Law & Eq. 20.

⁵ Cleveland v. Citizens Gas-light Co., 20 N. J. 201.

⁶ Walter v. Selfe, 4 Eng. Law & Eq. 20.

⁷ Salvin v. No. Brancepeth Coal Co., 31 L. T. (N. S.) 165; Sumney v. Wagener, 1 D. M. & G. 616; Attorney-General v. Aspinall, 2 M. & C. 613.

⁸ Attorney-General v. Birmingham, 4 K. & J. 528; Attorney-General v. Colney Hatch Asylum, 4 L. R. Ch. 148.

nitute on the other, is not a fact ordinarily of any special weight, but if the right and its violation is clear, an injunction will issue regardless of consequences.¹

SEC. 794. A person cannot go on and build extensive works and make heavy expenditures of money for the exercise of a trade or business that will invade the premises of another with smoke, noxious vapors or noisesome smells, to an unwarrantable or unlawful extent, and then, when called upon to desist, turn around and claim immunity for his trade or business, on the ground that to stop it would involve him in ruin;² nor that it is a necessary result of carrying on his trade at all, and that he has adopted the most improved methods known to science, or which human skill has devised,³ nor that his trade is a useful one,⁴ and beneficial to the community⁵ or to the nation,⁶ or that, by bringing a large number of workmen into the neighborhood, it has enhanced the value of the plaintiff's property,⁷ for, although his trade may be a lawful one, and conducted with the highest regard to producing as little injury as possible; while it may be that the injury produced from it, is a necessary incident to the exercise of the trade at all, and while to stop it may be injurious to him, may involve him in ruin even, yet these facts cannot protect him; if the plaintiff's rights are clear, and the nuisance conclusively established, his works must be stopped, regardless of consequences to him, "for he ought to have established his trade in great commons or waste places, away from great cities and human habitations."⁸ Neither will the fact that when he erected his works no houses were near, but that the plaintiff has come to his works, in any measure operate to protect him,⁹ for he should have taken the precaution to purchase enough of the surrounding property

¹ Webb v. Portland Manufacturing Co., 3 Sum. (U. S.) 334; Reid v. Gifford, Hopkins' Ch. (N. Y.) 225; Tipping v. St. Helen Co., 6 B. & S. 608; Roberts v. Clarke, 18 L. T. (N. S.) 49; Luscombe v. Steere, 17 id. 229.

² Attorney-General v. Leeds, 5 L. R. Ch. 583; Tipping v. St. Helen Smelting Co., 6 B. & S. 608; Attorney-General v. Colney Hatch Lunatic Asylum, 4 L. R. Ch. 143.

³ Ryland v. Fletcher, 1 L. R. Ex. 169.

⁴ Beardmore v. Treadwell, 7 L. T. (N. S.) 207.

⁵ Poynton v. Gill, 1 Rolle's Abr. 140.

⁶ Res Publica v. Caldwell, 1 Dallas (U. S.) 169.

⁷ Gile v. Stevens, 13 Gray, 146; Francis v. Schoellkopf, 53 N. Y. 156.

⁸ Poynton v. Gill, Rolle's Abr. 140.

⁹ Rex v. Neil, C. & P. 485; Brady v. Weeks, 3 Barb. (N. Y.) 156; Catlin v. Valentine, 9 Paige (N. Y.) 575.

when he built his works, to prevent the possibility of such results. By setting up his trade in the suburbs of a town, away from human habitations, he could not preclude others from coming there to occupy their lands for any of the ordinary or lawful purposes to which they might desire to devote it, and he, by neglecting to purchase enough of the surrounding property to protect him from such contingencies, must take the consequences of his folly, and move his works still further into uninhabited districts.¹

SEC. 795. While in determining the question of nuisance, the fact that the locality is in a measure given up to noxious trades, will not deprive a party of his remedy either at law or in equity, against one whose works are an actual nuisance,² yet, if the locality is wholly or principally given up to trades of a noxious character, and the plaintiff has himself devoted a part of his premises to business purposes, which in a measure contribute to the nuisance, he cannot by using a portion of his building for a dwelling acquire any superior right over other property owners in the neighborhood.³ The locality is always proper to be considered as well as the uses to which it is devoted, but it in no measure operates as a defense, unless it has been given up to noxious trades for the prescriptive period,⁴ nor then, if the owner of the nuisance complained of has not acquired a prescriptive right to carry on the trade there, if it sensibly, or appreciably, increases the nuisance existing in the locality.⁵ Neither does a prescriptive right to carry on a noxious trade, warrant an increase of the business so as to increase the nuisance.⁶ The right is only commensurate with the use, and though a noxious trade has been carried on for a century, in a given locality, which was productive of no special injury, yet, if, by reason of an increase of the busi-

¹ *Brady v. Weeks*, 3 Barb. (N. Y.) 156; *Catlin v. Valentine*, 9 Paige (N. Y.) 575.

² *Cleveland v. Citizens Gas-light Co.*, 20 N. Y. 201; *McKeon v. See*, 4 Robt. (N. Y.) 449; *Crump v. Lambert*, 8 L. R. Eq. 409; *Milligan v. Elias*, 19 Abb. Pr. (N. Y.) N. S.

³ *Gilbert v. Showerman*, 23 Mich. 448; *Doellner v. Tynan*, 31 How. Pr. (N. Y.) 176.

⁴ *Tipping v. St. Helen Smelting Co.*, 6 B. & S. 608; *Huckenstine's Appeal*, 70 Penn. St. 415, 10 Am. Rep. 170.

⁵ *Huckenstine's Appeal*, 70 Penn. St. 415; 10 Am. Rep. 170; *Robinson v. Baugh*, 31 Mich. 291.

⁶ *Baakhardt v. Houghton*, 27 Beavan, 425; *Lawler v. Potter*, 1 Hannay (N. B.), 328; *Tipping v. St. Helen Smelting Co.*, 6 B. & S. 608.

ness or a change in its character or use, it comes to produce injury, becomes a nuisance, the party is liable for all excess of injury beyond his right, and equity to that extent will enjoin him.¹

SEC. 796. A party may, by *laches*, deprive himself of an equitable remedy against a nuisance. Thus, if a party sleeps on his rights and allows a nuisance to go on without remonstrance or rather without taking measures either by suit at law or in equity to protect his rights, and allows the party to go on making large expenditures about the business which constitutes the nuisance, he will be regarded as guilty of such laches as to deprive him of equitable relief, particularly until the right has first been settled at law.² And where the delay is also coupled with an acquiescence, he will be deprived of all equitable relief,³ and may be placed in a position where the court will enjoin him from proceeding against the nuisance at law,⁴ or even to prevent the recovery of a judgment obtained therefor in a court of law.⁵

SEC. 797. A party affected by a nuisance cannot sleep upon his rights and delay and temporize and excuse himself upon the ground that he expected some one else, affected by the nuisance, to move in the matter. It is his business to protect and look out for his own rights.⁶ But the party will not be estopped from ultimate relief in a court of equity by *mere* delay after his rights have been settled at law, if he has done nothing amounting to active acquiescence in the nuisance.⁷

¹ Oldaker v. Hunt, 19 Beav. 485; Robertson v. Stewart, 9 G. & M. (C. S.) 189.

² Carlisle v. Cooper, 20 N. J. 599; Morris, etc., Railroad Co. v. Prudden, id. 530; Goodwin v. Canal Co., 18 Ohio St. 169; Birmingham Canal Co. v. Lloyd, 18 Vesey, 515; Pulling v. Railroad Co. 33 L. J. (Ch.) 505; Marker v. Marker, 9 How. 1, 16; Williams v. Earl of Jersey, Cr. & Ph. 92; Hilton v. The Earl of Granville, Cr. & Ph. 284.

³ Bankhardt v. Houghton, 27 Beav. 425.

⁴ Houghton v. Bankhardt, ante; Hentz v. Long Island Railroad Co., 13 Barb. (N. Y.) 647; Haines v. Taylor, 2

Ph. 209; Society v. Low, 17 N. J. 19; Gray v. Railroad Co., 1 Grant's Cas. (Penn.) 412; Swaine v. Seamens, 9 Wall. (U. S.) 254; Irvine v. Irvine, id. 618.

⁵ St. Helen Smelting Co. v. Tipping, 1 L. R. Ch. App. 66.

⁶ Morris v. Prudden, 20 N. J. 530; Attorney-General v. Railroad Co., 24 N. Y. 49.

⁷ Meigs v. Lester, 23 N. J. 199; Canal Co. v. King, 16 Beav. 643; Jones v. Canal Co., 2 Molloy, 319; Williams v. Earl of Jersey, Cr. & Ph. 92; Coles v. Simms, 5 D. M. & G. 1; Attorney-General v. Board of Health, 2 Jur. (N. S.) 180; Ramsden v. Dyson, 1 L. R. H. L.

SEC. 798. As to what constitutes an acquiescence in a nuisance, to the extent to deprive a person of equitable relief, as well as to constitute an equitable estoppel, so that a court of equity will restrain a party from proceeding at law to recover damages arising from a nuisance, it may be said that mere delay for several years in bringing an action will not of itself constitute an acquiescence. Neither will an actual assent to the erection of the nuisance, and active participation in its erection, unless the party had reason to suppose that the erection would be a nuisance.¹ But if the thing or erection is, of itself, or in the use of which it is to be devoted, in its nature a nuisance, assent thereto or active acquiescence therein is such an acquiescence as will deprive a party of an equitable remedy,² and, after the erection is completed, and by its use has become a nuisance, if the party, without taking measures to stop the nuisance by suit, allows the owner to go on and make large additions thereto, or expend money upon the same in its repair, this will operate as an equitable estoppel, which will warrant a court of equity in restraining proceedings at law for damages arising from the nuisance.³ But in order to constitute such an estoppel there must be "wrong on one side and freedom from blame on the other."⁴ The acts of the party affected by the nuisance must have been such as to make

129; *Goldsmid v. Tunbridge Wells Co.*, 1 L. R. Ch. 349; *Rumlins v. Wickham*, 3 D. & J. 304; *Landmexborough v. Bower*, 2 L. T. 205; *Roads Co. v. Railroad Co.*, 1 Ra. Ca. 653; *Western v. McDermott*, 2 L. R. Ch. App. 72; *Barker v. Railroad Co.*, Ra. Ca. 401.

¹ The acquiescence must be such that, to allow the party to proceed to recover damages for the nuisance, would operate as a fraud upon the defendant. The mere standing by and seeing the works going on without objection is not sufficient. The business must be such that, in its very nature, it is a nuisance. If it is only a business which may or may not become a nuisance acquiescence is no estoppel. *Bankhardt v. Houghton*, 27 Beav. 430; *Meigs v. Lester*, 20 N. J. 199; *Carlisle, etc., v. Cooper*, 21 id. 599; *Heiskell v. Gross*, 7 Phila. (Penn.) 317. Nor where the erection is, in fact, a nuisance, if it has been productive of no damage. *Heiskell v. Gross*, ante; *Haines v. Tay-*

lor, 2 Ph. 209; *Greenhalgh v. R. R. Co.*, 3 M. & C. 784; *Canal Co. v. King*, 2 Sim. (N. S.) 87; *Stakes v. Singers*, 31 E. C. L. 92; 8 E. & B. 31; *Crossly v. Lightowler*, 2 L. R. Ch. App. 478; *Corning v. Troy Nail, etc., Co.*, 34 Barb. (N. Y.) 485; 40 N. Y. 191.

² *Great Western R. R. Co. v. Oxford, etc., R. R. Co.*, 3 D. M. & G. 341; *Wood v. Sutcliffe*, 2 Sim. (U. S.) 163; 8 Eng. Law & Eq. 217; *Helms v. McFadden*, 18 Wis. 191.

³ *Attorney-General v. R. R. Co.*, 24 N. J. 49; *Heiskell v. Gross*, 7 Phila. (Penn.) 317.

⁴ *Batchelder v. Sanborn*, 4 Foster (N. H.), 474. A person who acts in ignorance of his rights will not generally be prejudiced thereby. *Lewis v. San Antonio*, 7 Texas, 288; *R. R. Co. v. R. R. Co.*, 3 D. M. & G. 341; *Dickson v. Green*, 24 Miss. 612; *Calhoun v. Richardson*, 30 Conn. 210; *Mitchell v. Leavett*, id. 587.

any attempt on his part to stop the nuisance or recover damages therefrom a positive fraud. Therefore, the thing must, in its very nature, have been a nuisance, and of such a character that the party assenting was charged with notice of the full extent of its noxious character, and the probable injury that would arise therefrom.¹ If the thing was something which might or might not become a nuisance, according to the circumstances of its use, he would not be estopped unless he knew the precise method of its use, and was fairly chargeable with notice of its results.² So too if the party making the erection has done or said any thing in reference to his use of the property, and its results that has misled the party, no estoppel can be asserted,³ or if the trade or business has been carried on in a small way, without injurious results, a neglect to remonstrate against an enlargement of the works will not amount to an estoppel, unless the party was fairly chargeable with knowledge that their use as enlarged would result in an actual nuisance.⁴

So, too, if the only acquiescence claimed is in allowing the party to go on and make expenditures in his business, without expenditures in erections or repair of the same, courts will not generally treat that as such an acquiescence as deprives a party of equitable relief after the right has been determined at law.⁵

A party must not sleep upon his rights, when such delay operates as an acquiescence in a wrongful act injurious to him, particularly when, by reason of such delay, the other party goes on and expends money in his erections and about his business and is thus subjected to loss that proper and timely action on the part of the plaintiff would have prevented. If he does, when he goes into a court of equity for relief, he will be told that he has come too late, and is without equitable relief.⁶

¹ Johnson v. Wyatt, 2 D. J. & S. 18; Bankhardt v. Houghton, 27 Beav. 240.

² Bankhardt v. Houghton, ante; Greenhalgh v. R. R. Co., 3 M. & C. 784.

³ Davies v. Marshall, 10 C. B. (N. S.) 711; Rawlins v. Wickham, 3 D. & J. 304.

⁴ Bankhardt v. Houghton, ante.

⁵ Archbald v. Scully, 9 H. L. 388.

⁶ Attorney-General v. R. R. Co., 24 N. J. 49; Meigs v. Lester, 20 N. J. 199;

Williams v. Earl of Jersey, Cr. & Ph. 92. But mere delay, so long as the parties remain in *statu quo*, will not deprive a party of equitable relief. Gale v. Abbott, 8 Jur. (N. S.) 987; Carlisle v. Cooper, 20 N. J.; Heiskell v. Gross, 7 Phil. (Penn.) 317; 3 Phil. (Penn.) 363; Gordon v. R. R. Co., 5 Beav. 233. The question as to whether a delay long or short will operate to estop an assertion of a right, depends entirely upon what has been done by the parties,

SEC. 799. In this country, as well as in England, unless the party has done something to deprive himself of an equitable remedy to restrain a continuous nuisance, after the question of nuisance has been determined in a court of law, an injunction will be granted even though no actual damage results therefrom.¹ But if the injury is trifling, and the nuisance temporary, and the party has an adequate remedy at law, the courts will sometimes refuse to interfere, when the inconvenience and damage resulting to the defendant will be much greater by its interference than the injury to the plaintiff will be if the remedy is denied.² But, if the nuisance is a constantly recurring grievance, the court will interfere as a matter of course, to prevent interminable litigation and a multiplicity of suits.³

SEC. 800. The acts of several persons acting separately and without concert, and entirely and independent of each other, may together constitute a nuisance, when the acts of either one alone would not create it, and such parties may be joined as defendants in a bill for an injunction.⁴

SEC. 801. It would be impossible to give all the instances in which courts of equity have interfered, or refused to interfere in cases of nuisance. It is enough to say that when the right is clear, and the nuisance established, a court of equity will always interfere, if the nuisance results from an unlawful act,⁵ is continuous in its nature,⁶ or if only temporary, if it is not adequately compensable in damages.⁷ Injunctions have been granted to prevent the erection of slaughter-houses in the vicinity of dwellings, even where the neighborhood had been in a measure given

whether the delay has changed their status. *Archbald v. Scully*, 9 H. L. 388.

¹ *Webb v. Portland Manufacturing Co.*, 3 Sum. (U. S.) 485; *Reid v. Gifford*, *Hopkins' Ch.* (N. Y.) 416; *Goodson v. Richardson*, 9 L. R. Ch. App. 225; *Wilts v. Waterworks Co.*, id. 465; *Bassett v. Company*, 47 N. H.

² *Richards v. Phoenix Co.*, 57 Penn. St. 294; *Huckenstine's Appeal*, 70 id. 190; 10 Am. Rep. 170; *Cooke v. Forbes*, 5 L. R. 166.

³ *Sutcliffe v. Wood*, 8 Eng. Law & Eq. 217; *Parker v. Winnepisogee Co.*, 2 Black (U. S.), 565; *Reid v. Gifford*,

Hopkins' Ch. (N. Y.) 146; *Pollitt v. Long*, 58 Barb. (N. Y.) 20; *Gardner v. Newburgh*, 2 Johns. Ch. (N. Y.) 162; *Case v. Haight*, 3 Wend. (N. Y.) 632; *Arthur v. Case*, 1 Paige's Ch. (N. Y.) 417; *Belknap v. Trimble*, 3 id. 577; *Corning v. Troy Nail, etc., Co.*, 40 N. Y. 191; 34 Barb. (N. Y.) 485.

⁴ *Thorpe v. Brumfitt*, 8 L. R. Ch. 609. ⁵ *Rochester v. Curtis, Clarke's Ch.* (N. Y.) 336.

⁶ *Pollitt v. Long*, 58 Barb. (N. Y.) 20; *Corning v. Troy Nail, etc., Co.*, 40 N. Y. 191.

⁷ *Reid v. Gifford*, 8 *Hopkins' Ch.* (N. Y.) 146.

up to trades of a noxious character.¹ To prevent the continuance of the business of slaughtering cattle in the vicinity of dwellings, even when the slaughter-house was erected before any dwellings were erected in the vicinity.² To restrain the erection of glue works;³ of works for the preparation of blood as an ingredient for Prussian blue;⁴ of melting houses and fat boiling establishments;⁵ bone boiling establishments;⁶ establishments for the preparation of tripe;⁷ for the manufacture of gas;⁸ cattle yards;⁹ the burning of bricks near dwellings;¹⁰ planing mills emitting dense volumes of smoke;¹¹ potteries;¹² the use of mineral coal as fuel;¹³ the burning of lime kilns;¹⁴ the maintenance of livery stables near dwellings, impairing their comfort by noxious stenches, noise and drawing flies to the vicinity;¹⁵ a turpentine distillery;¹⁶ the carrying on of noisy trades near a dwelling at unreasonable hours,¹⁷ or so as to impair its comfortable enjoyment;¹⁸ or so as, by agitating and varying sounds and motions, to produce actual injury to property;¹⁹ or the performance of brass bands in the vicinity of dwellings, collecting crowds and impairing the comfortable enjoyment of property;²⁰ or a regatta near a dwelling collecting a crowd;²¹ or running railroad cars near a church on the Sabbath, and letting off steam, blowing the whistle and ringing the bell so as to disturb divine worship there, and injure the value of the property for church purposes.²² The pollution of water,²³ so as to impair its use for domestic

¹ *Kelt v. Lindsay*, 17 F. C. (Sc.) 677;
Davidson v. Oliphant, id. 491.

² *Brady v. Weeks*, 3 Barb. (N. Y.) 156; *Catlin v. Valentine*, 9 Paige's Ch. (N. Y.) 575.

³ *Charity v. Riddle*, 14 F. C. (Sc.) 237.

⁴ *Jamieson v. Hillcote*, 12 F. C. (Sc.) 424.

⁵ *Peck v. Elder*, 3 Sandf. (N. Y.) 126.

⁶ *Meigs v. Lester*, 20 N. J. 199.

⁷ *Farquhar v. Watson*, 17 F. C. (Sc.) 692.

⁸ *Cleveland v. Citizens Gas-light Co.*, 20 N. J. 201; *Broadbent v. Imperial Gas Co.*, 7 D. G. & M. 700.

⁹ *Babcock v. N. J. Stock Yard Co.*, 20 N. J. 296.

¹⁰ *Fusileer v. Spalding*, 2 La. 773; *Walter v. Selfe*, 4 Eng. Law & Eq. 20.

¹¹ *Duncan v. Hayes*, 22 N. J. 23.

¹² *Ross v. Butler*, 20 N. J. 294.

¹³ *Campbell v. Seaman*, 2 N. Y. Sup. Ct. Rep. 231.

¹⁴ *Hutchins v. Smith*, 63 Barb. (N. Y.) 252.

¹⁵ *Aldrich v. Howard*, 4 Ames (R. I.) 93.

¹⁶ *Simpson v. Justice*, 8 Ired. (N. C.) 115.

¹⁷ *Dennis v. Eckhardt*, 54 Penn. St. 274.

¹⁸ *Ball v. Ray*, 8 L. R. Ch. 467.

¹⁹ *McKeon v. See*, 51 N. Y. 571.

²⁰ *Walker v. Brewster*, 5 L. R. Eq. 25; *Inchbald v. Barington*, 4 L. R. Ch. 388.

²¹ *Bostock v. No. Staffordshire R. R. Co.*, 19 Eng. Law & Eq. 449.

²² *First Baptist Church, etc. v. R. R. Co.*, 5 Barb. (N. Y.) 79.

²³ *Holsman v. Boiling Spring Bleaching Co.*, 1 McCarter (N. J.), 342; *Goldsmid v. Tunbridge Wells*, 1 L. R. Ch. App. 379; *Attorney-General v. Leeds*, 5 L. R. Ch. 583; *Attorney-General v. Birmingham*.

purposes' or manufacturing purposes,³ or so as to cause the emission of noxious smells,⁴ or so as to destroy it for the purpose of furnishing it for domestic use,⁴ or so as to injure the navigability of the stream,⁵ or so as to impair the value of wharf property,⁶ and in fact it may be said that a court of equity has concurrent jurisdiction with a court of law in all cases of actual nuisance, and, whatever is regarded as a legal nuisance, producing injury to property or rights, will, in a proper case for equitable relief, be restrained by it.⁶ To enumerate all the special instances, would be an endless, as well as utterly useless task, for the fact that a nuisance has been restrained in one case, furnishes no reason why it should be refused or granted in another, as each case must stand upon its own facts, circumstances and equities, and no definite or precise standard can be given. But in all cases where the right is clear, the nuisance established, and there is nothing in the conduct of a party that disentitles him to relief, and there is not a complete and perfectly adequate remedy at law, a party may always apply to a court of equity with the fullest confidence of receiving all the relief which, under the circumstances of the case, it can afford.⁷

SEC. 802. The same jurisdiction is exercised over nuisances relating to interferences with rights to water, as to other nuisances, and a court of equity will interfere to restrain the diversion of water from a mill,⁸ or from the lands of

¹ Vedder v. Vedder, 1 Den. (N.Y.) 357.

² Carhart v. Auburn Gas-light Co., 23 Barb. (N. Y.) 497.

³ Attorney-General v. Bradford Canal Co., 2 L. R. 71; Attorney-General v. Steward, 20 N. J. 415; Babcock v. N. J. Stock Yard Co., 20 N. J.

⁴ Goldsmid v. Tunbridge Wells, 1 L. R. Ch. App. 161.

⁵ Philadelphia v. Gilmartin, 71 Penn. St. 140.

⁶ Hudson R. R. Co. v. Loeb, 7 Robt. (N. Y.) 415.

⁷ Cleveland v. Citizens Gas-light Co., 20 N. J. 201.

⁸ Webb v. Portland Manufacturing Co., 3 Sumner (U. S.), 334; Reid v. Gifford, Hopkins' Ch. (N.Y.) 146; Cott v. Lewiston, 36 N. Y. 217; Crocker v. Bragg, 10 Wend. (N. Y.) 260; Elwell

v. Crowther, 31 Beav. 163; Robinson v. Byron, 1 Bro. C. C. 588; Tipping v. Eckersley, 2 K. & G. 264; Wilts v. Swinton Waterworks Co., 9 L. R. Ch. 426; Rochdale Canal Co. v. King, 16 Beav. 630; Gardner v. Newburgh, 2 Johns. Ch. (N. Y.) 162; Lyon v. McLaughlin, 32 Vt. 423; Corning v. Troy Nail, etc. Co., 34 Barb. (N. Y.) 488.

In Lyon v. McLaughlin, *supra*, the court say that in cases of this character where the invasion of one's right to water is of a *continuous* nature, an injunction is not only *permissible* but is the proper remedy, upon the ground that the damages are necessarily of an indefinite nature and not susceptible of proper estimation. Tuolumne v. Chapman, 8 Cal. 392.

But in order to warrant an injunc-

another,¹ or to prevent an unlawful or excessive use of water,² or to prevent its wrongful detention,³ or to prevent its unnatural and improper discharge upon lower lands,⁴ or to prevent its being raised so as to flood another's land,⁵ or so as to cut off the drainage of his lands,⁶ or so as to destroy his wells or springs,⁷ or so as to make his land wet and spongy,⁸ or so as to cause water to percolate into his cellar,⁹ or so as to impair the quality of the water for manufacturing or other purposes,¹⁰ and generally, in all cases where by the use of water a legal right is invaded, which is of a continuous nature, or threatens to be continuous, and the injury is irreparable, or there is no proper and adequate redress in a court of law, equity will interfere not only to settle the rights, but to restrain the wrong, and fix the damages resulting from the nuisance.¹¹ But, where there is an ample remedy at law, equitable jurisdiction will not be exercised until after verdict.¹²

SEC. 803. So, too, equity will restrain excavations in the adjoining soil of another so as to prevent the falling away of another's soil¹³ where no burdens that materially increase the lateral pressure have been placed thereon,¹⁴ and will interfere even where buildings are standing upon the land if it appears that they do not sensibly add to the lateral pressure.¹⁵ So too, where land is

tion the interference with the water must be plain and sensible, and such as clearly operates as an invasion of the plaintiff's right. *Shreeve v. Voorhees*, 2 Green (N. J.), 25.

¹ *Crocker v. Bragg*, 10 Wend. (N. Y.) 260; *Duke of Buccleugh v. Metropolitan Board of Works*, 5 H. L. 518.

² But it must be alleged in the bill, and proved on the hearing that the injury is irreparable. *Marble & Slate Co. v. Adams et al.*, 46 Vt. 434; *Lyon v. McLaughlin*, 32 id. 423; *Coe v. Winnepiseogee Lake Co.*, 37 N. H. 255; *Wright v. Moore*, 38 Ala. 593. But contra see *Sprague v. Rhodes*, 4 R. I. 301.

³ *Pollitt v. Long*, 58 Barb. (N. Y.) 55.

⁴ *Bemis v. Upham*, 13 Pick. (Mass.) 169; *Ballou v. Inhabitants*, 4 Gray (Mass.), 324; *Potter v. Burden*, 38 Ala. 693.

⁵ *Robinson v. Byron*, 1 Bro. C. C. 588; *White v. Forbes*, Walk. (Mich.) 112.

⁶ *Bassett v. Company*, 47 N. H. 578.

⁷ *Williams v. Morland*, 2 B. & C. 910; *Ware v. Regents Canal Co.*, 3 D. & G. 212.

⁸ *Bassett v. Company*, 47 N. H.

⁹ *Wilson v. City of New Bedford*, 108 Mass. 261; 11 Am. Rep. 352.

¹⁰ *Carhart v. Auburn Gas-light Co.*, 22 Barb. (N. Y.) 497.

¹¹ *Lyons v. McLaughlin*, 32 Vt. 423.

¹² *Laney v. Jasper*, 39 Ill. 46. But because he has a remedy at law for a nuisance, he will not necessarily be denied an injunction to restrain its continuance. *McGinness v. Adriatic Mills*, 116 Mass. 177.

¹³ *Dent v. Auction Mart Co.*, 35 L. J. Ch. 555.

¹⁴ *Richardson v. Vermont Central Railroad Co.*, 25 Vt. 438; *Hunt v. Peake*, Johns. Ch. (Eng.) 710; *Bonomi v. Backhouse*, 9 H. L. 512.

¹⁵ *Stroyan v. Knowles*, 6 H. & N. 454; *Roberts v. Haines*, 6 E. & B. 643.

directly or indirectly dependent upon other land for support it will prevent excavations that will cause that land to subside so as to injure lands lying adjoining thereto.¹ But where the soil has been removed adjoining the lands of another, and replaced by an artificial support, no right exists for the support of such artificial structure or wall, and a court of equity will not, except where the right is given by contract, express or implied, or by grant, interfere to prevent excavations in the adjoining soil, that threaten even the destruction of such wall or artificial support, or the buildings erected thereon.² So a court of equity will interfere to prevent a removal of minerals that will cause a subsidence of or injury to the surface,³ even though there are buildings thereon, when they do not sensibly increase the vertical pressure,⁴ unless the right is expressly given by deed.⁵ But if the party owning the surface has erected buildings thereon that sensibly increase the pressure, he is not entitled to relief as to them.⁶ So, too, where buildings adjoining each other have leaned upon each other for support, for the prescriptive period to the knowledge of the parties, either party will be restrained.⁷ So where houses have been erected by the same owner mutually dependent upon each other for support, and neither capable of standing without the aid of the other and sells the houses to different persons, either party will, so long as the walls are sufficient for that purpose, be restrained from pulling down his house to the injury of the other.⁸ But when the houses or walls fall into decay and cease to yield proper support or to be suitable for that purpose, the easement ceases.⁹

SEC. 804. So, too, equity will interfere to prevent any unreasonable or unwarrantable use of or interference with party walls by one owner to the injury and detriment of the other, where such use or interference weakens the wall or renders it in any

¹ *Shaw v. Thackerah*, 1 L. R. (C. P.) 564; *Bonomi v. Backhouse*, 9 H. L. 512; *Farrand v. Marshall*, 19 Barb. (N. Y.) 380.

² *Panton v. Holland*, 17 Johns. (N. Y.) 92; *La Sala v. Holbrook*, 4 Paige Ch. (N. Y.) 163.

³ *Salisbury v. Gladstone*, 9 H. L. 702.

⁴ *Brown v. Robbins*, 4 H. & N. 186.

⁵ *Murchie v. Black*, 19 C. B. (N. S.) 190.

⁶ *N. E. R. R. Co. v. Elliott*, 10 H. L. 333.

⁷ *Richards v. Rose*, 9 Exchq. 218.

⁸ *Suffield v. Brown*, 33 L. J. (Ch.) 249.

⁹ *Partridge v. Gilbert*, 15 N. Y. 601.

measure less safe than formerly, or from devoting it to a use, or making such alterations therein or additions thereto as conflict with the rights of the other owner, and as he has no right to make when the damage so inflicted is not properly compensable at law.¹

SEC. 805. Equity will interfere to protect special franchises conferred by the legislature or acquired by prescription, and will prevent individuals or corporations from doing any act that violates in any measure the privileges caused by the franchise. And as such privileges are not susceptible of actual valuation in money, and as their value is principally dependent upon exclusive and uninterrupted exercise, courts will always interfere by injunction for their protection, when the act complained of is an actual invasion or violation of the rights covered by the franchise.² The right need not be first settled at law, as the legislative grant is to be respected, and the only question is, whether its provisions have been interfered with.³

SEC. 806. Thus the owner of a ferry,⁴ a toll bridge,⁵ a turnpike,⁶ a railroad,⁷ or any other special franchise, conferring special privileges and franchises, is at all times entitled to equitable protection, when those special rights or privileges are invaded by the unlawful act of another, and a court of equity will always exercise jurisdiction over such cases and determine both the question of right, invasion and damage.⁸

SEC. 807. So, too, courts of equity will always exercise jurisdiction in cases of *natural franchise*, or special franchise acquired

¹ Phillips v. Boardman, 4 Allen (Mass.) 147.

² Enfield v. Hartford, 17 Conn. 40; Lucas v. McBlair, 12 Gill. & J. (Md.) 1; Boston v. Salem, 2 Gray (Mass.), 1; McRoberts v. Washburn, 10 Minn. 23; Livingston v. Ogden, 4 Johns. Ch. (N. Y.) 48.

³ Piscataqua Bridge Co. v. New Hampshire, etc., 7 N. H. 35.

⁴ McRoberts v. Washburne, 10 Minn. 23; Beckley v. Learn, 3 Oregon, 470; also, id. 544; Piatt v. Covington Br. Co., 8 Bush (Ky.), 31; Broadway Ferry Co. v. Hankey, 31 Md. 346.

⁵ Enfield Br. Co. v. Hartford Br. Co. 17 Conn. 40; Charles River Br. Co. v. Warren Br. Co., 6 Pick. (Mass.) 376.

⁶ Newburgh v. Miller, 5 Johns. Ch. (N. Y.) 101; Croton v. Ryder, 1 id. 611; Auburn v. Douglass, 12 Barb. (N. Y.) 553.

⁷ N. Y., etc., v. 42d St. R. R. Co., 50 Barb. (N. Y.) 285; So. Carolina R. R. Co. v. Columbia R. R. Co., 13 Rich. (S. C.) 339; Brooklyn R. R. v. Coney Island R. R. Co., 35 Barb. (N. Y.) 364.

⁸ Gates v. McDaniel, 2 Stew. (Ala.) 211; Livingston v. Van Ingen, 9 Johns (N. Y.) 607.

by long user. Thus the owner of lands upon a navigable stream, whose title extends to low-water mark, is regarded as possessed of a *natural franchise*, a special privilege over that portion of the stream covered by his title, subject only to the easement of navigation. By virtue of this privilege he may erect wharves for his own use or for his own profit, taking care not to materially obstruct navigation, and in the exercise of this right he will be protected against the unlawful interference of others by injunction.¹ So, too, a person, by long exercise of the exclusive right of fishery in a public river, may acquire a right to fish there of which he cannot be deprived, and in the exercise of which he will be protected. So, too, on public streams, where the owner of the banks owns also the bed of the stream, unless otherwise provided by special law, has the exclusive right of fishing in that portion of the river, and this is a right which a court of equity will protect.²

SEC. 808. Generally when the answer denies the nuisance, and all the equities of the plaintiff's bill, the court will dissolve the preliminary injunction,³ but this is not necessarily the case, as if the court is satisfied that a nuisance is being, or is likely to be committed, which will produce irreparable injury to the plaintiff if allowed to go on, and which is likely to be consummated before a hearing upon the merits can be had,⁴ or if the act complained of, will operate a total or even partial destruction of the plaintiff's right,⁵ or if the act, if in fact a nuisance, will, if allowed to go on, involve the defendant in serious pecuniary loss, the court will retain the injunction until final hearing for the protection

¹ Del. & Hud. Canal Co. v. Lawrence, 9 N. Y. Sup. Ct. (Hun.) 154.

² Chapman v. Oshkosh R. R. Co., 33 Wis. 639.

³ Finnegan v. Lee, 18 How. Pr. (N. Y.) 186; Gould v. Jacobson, id. 158; Manhattan Gas Light Co. v. Barker, 7 Robt. (N. Y.) 156; Middletown v. Roundout R. R. Co., 43 How. Pr. (N. Y.) 481; Rhea v. Forsyth, 37 Penn. St. 503; Rayle v. Indianapolis R. R. Co., 32 Ind. 259; Conolly v. Conger, 40 Ga. 229; De Godey v. De Godey, 39 id. 157; Winslow v. Hudson, 21 N. J. 172; Youngs v. Shepard, 44 Ala. 315; Mil-

ler v. McDougall, 44 Miss. 682; New v. Wright, id. 202; Brown v. Haskins, 45 id. 183; Edwards v. Banksmith, 35 Ga. 213; Johnson v. Allen, id. 252; Murray v. Elston, 23 N. J. 27; Peterson v. Parrott, 4 W. Va. 44.

⁴ Blakemore v. Glamorganshire R. R. Co., 1 M. & R. 154; Gordon v. R. R. Co., 5 Beav. 239; Coker v. Birge, 9 Ga. 425.

⁵ R. R. Co. v. R. R. Co., 49 Me. 392; Smith v. Fitzgerald, 24 Ind. 316; Van Bergen v. Van Bergen, 3 Johns. Ch. (N. Y.) 282.

of all parties.¹ But, if the nuisance is not injurious to health,² or does not seriously impair the use or enjoyment of property,³ or is not of a nature that will operate as a destruction of any of the plaintiff's rights,⁴ or if the plaintiff has been guilty of *laches*,⁵ or if the question of nuisance is doubtful under all the circumstances set up in the bill and answer,⁶ or the damage to the defendant from the injunction will be much greater than the damage to the plaintiff by being subjected to it, the practice is, to dissolve the injunction upon the coming in of the answer denying *all* the equities of the plaintiff's bill,⁷ but not where all the equities of the bill are not denied.⁸

When the answer, however, seeks to avoid the equities of the bill, by setting up new matter, the new matter will not be regarded upon the question of dissolution.⁹

When there is more than one defendant, upon coming in of the answer of the one upon whom the *gravamen* of the case lies, and who is peculiarly possessed of the requisite facts upon which to make answer, the court will entertain a motion to dissolve, even though the other defendants have not answered.¹⁰

SEC. 809. The retention or dissolution of the injunction under such circumstances is a matter that rests in the sound discretion of the court,¹¹ and, if it sees any proper reason for retaining it,

¹ *Cunningham v. Rome, etc.*, 27 Ga. 499.

² *Hack Improvement Co. v. R. R. Co.*, 22 N. J. 94; *Higbee v. R. R. Co.*, 20 N. J. 435.

³ *Thiebault v. Conover*, 11 Fla. 143; *Adams v. Michael*, 38 Md. 125.

⁴ *Cunningham v. Rome R. R. Co.*, 27 Ga. 499; *Wasson v. Sanborn*, 45 N. H. 172.

⁵ *Dana v. Valentine*, 5 Met. (Mass.) 8; *Reid v. Gifford*, 6 Johns. Ch. (N. Y.) 146; *Parker v. Lake Co.*, 2 Black (U. S.) 545.

⁶ *Barnes v. Calhoun*, 2 Ired. (N. C.) 199; *Adams v. Michael*, ante; *Cleveland v. Citizens Gas-light Co.*, 20 N. J. 201.

⁷ *Rigby v. Great Western R. R. Co.*, 2 Ph. 44; *Sanxter v. Foster*, Cr. & Ph. 302.

⁸ *Pyecraft v. Pyecraft*, 2 Sm. & G. 326.

⁹ *Stockett v. Johnson*, 22 La. An. 89; *West Jersey R. R. Co. v. Thomas*, 21

N. J. 205; *Milwaukie v. O'Sullivan*, 25 Wis. 666; *Judson v. Hatch*, 31 Iowa, 491; *Society v. Law*, 2 Green (N. J.) 19.

¹⁰ *Peterson v. Parrott*, 4 W. Va. 44; *Garrett v. Lynch*, 44 Ala. 683; *School Commissioners v. Putnam*, id. 506; *Thompson v. McNair*, Phill. (N. C.) 121.

¹¹ *Edwards v. Banks*, 35 Ga. 213; *Firmstone v. DeCamp*, 2 Green (N. J.), 309; *Orr v. Rittlefield*, 1 W. & M. (U. S.) 13. But see *Marshman v. Conklin*, 2 id. 282; also *Morris Canal, etc., Co. v. Fagan*, 3 Green (N. J.), 215; and *Suffern v. Butler*, id. 220; *Camden, etc., R. R. Co. v. Stewart*, id. 489; *Drone v. Winter*, 41 Miss. 517. In Maryland an injunction will be dissolved when the answer is strictly responsive. *Calvin v. Warford*, 17 Md. 433; *Dorsey v. Bank*, 17 id. 408. But in California the rule is in accordance with the text. *Johnson v. Widewert & Co.*, 22 Cal. 479. But otherwise when the answer is accompanied by affidavits, and no affi.

it will do so until final hearing.¹ If it appears that the damage would be great or irreparable, if the plaintiff's right to an injunction should finally be established,² or that the defendant is irresponsible,³ or that the peril to the defendant, in point of damages, if he should be allowed to go on, would be great,⁴ the injunction will not be dissolved.

But, except under extraordinary circumstances, an injunction will not be dissolved, unless all the equities of the bill are fully met and denied.⁵ The fact that a part are denied is not sufficient.⁶ The denial must also be upon the *knowledge* of the defendant, a denial upon information and belief is not sufficient.⁷ But where an injunction is illegally granted, as where it is contrary to statute, it will be dissolved, summarily, without motion even,⁸ or if the facts set forth in the bill are not fully verified the injunction will be dissolved upon coming in of the answer.⁹ The fact that the nuisance has been abated under an order of the court does not necessarily afford a reason why an injunction should not be granted to restrain a revival of the nuisance.¹⁰ But generally where the cause for the injunction has been removed, unless there are special reasons to the contrary, the injunction will be dissolved; as, where a railroad company is proceeding contrary to law, or in

equity, affidavits are produced to support the bill. *Mining Co. v. Mining Co.*, 23 Cal. 82; *Swift v. Swift*, 13 Ga. 140; *Wert v. Rowe*, 14 id. 705.

¹ *Irick v. Black*, 2 Green (N. J.), 189; *Linton v. Denham*, 6 Fla. 533; *Shricker v. Field*, 9 Iowa, 366. Affidavits may be used to support either the bill or answer. *Hascall v. University*, 8 Barb. (N. Y.) 174; *Wandworth v. Rogers*, 3 W. & M. (U. S.) 135; *University v. Green*, 1 Md. Decisions, 97; *Holt v. Bank of Augusta*, 9 Ga. 552.

² *Johnson v. Allen*, 35 Ga. 252; *Spring v. Strauss*, 3 Bosw. (N. Y.) 607; *Linton v. Denham*, 6 Fla. 533.

³ *Blarson v. Van Armings, Phill.* (N. C.) 133; *Ponder v. Cox*, 28 Ga. 305. But there must be equity in the bill. *Smith v. Lord*, 28 Ga. 585; *Rainey v. Jones*, 34 id. 111.

⁴ *Hess v. Winder*, 34 Cal. 270.

⁵ *Marlatt v. Perrine*, 2 Green (N. J.), 49; *Masterton v. Barney*, 8 Stockt. (N. J.) 26; *Armstrong v. Sandford*, 7 Minn. 49.

⁶ *Randall v. Morrill*, 2 Green (N. J.), 343; *State v. Northern R. R. Co.*, 18 Md. 193. But if a subsequent answer is filed swearing away all the equities of the bill the injunction under the Maryland practice will be dissolved. *Hyde v. Ellery*, 18 Md. 496; *Little v. Marsh*, 2 Ired. (N. C.) 18; *Mitter v. Washburn*, 3 id. 161; *Denner v. Eller*, 7 id. 24.

⁷ *Holdredge v. Gwynne*, 3 Ired. (N. C.) 26; *Daub v. Burnes*, 1 Md. Decisions, 127; *Coffee v. Newsom*, 8 Ga. 444; *Morris, etc., Co. v. Jersey City*, 3 Stockt. (N. J.) 13; *Kitchens v. Howard*, 30 Ga. 931; *Smith v. Appleton*, 19 Wis. 468; *Powell v. Brown*, 23 Ga. 275.

⁸ *Marlatt v. Perrine*, 2 Green (N. J.), 49.

⁹ *Fowler v. Roe*, 3 Stockt. (N. J.) 367; *Holdredge v. Gwynne*, 3 Ired. (N. C.) 26; *Sutherland v. Lagro, etc., Co.*, 19 Ind. 192.

¹⁰ *Peck v. Elder*, 3 Sandf. (N. Y.) 126.

excess of its powers, if a subsequent act of the legislature legalizes its acts and gives it the power to do that which the injunction restrains it from doing, the injunction will be dissolved as a matter of course, unless there still remains a doubt as to the extent of the defendant's right.¹ So where a bill does not warrant an injunction; if an injunction has been issued it will be dissolved as an improvident injunction,² and for the purpose of determining the motion, all the allegations of the bill will be regarded as true.³

SEC. 810. The motives of the plaintiff in bringing his bill are not open to inquiry, nor do they have influence upon the result. The question is wholly a question of rights, and if a legal right has been violated the party is entitled to protection, whatever may have been his motives in bringing his bill or seeking an injunction.⁴ But the motives of the defendant may be inquired into if his act is really unlawful, as, if his act is wanton and unprovoked, the courts will regard that, not only upon the question of granting an injunction, but also in the estimation of damages.⁵ But before the question of motive can be gone into, or at least before it can be allowed to have any bearing upon the result, the unlawful character of the act complained of must be established.⁶

SEC. 811. In cases of nuisances purely public, the proper remedy is by bill in the name of the attorney-general, or of the people, instituted by him.⁷ So in all cases of purpresture or encroachment upon the "*jus privatum*" of the State, the State alone, through its proper legal officer, can bring a bill.⁸ But where the nuisance which, while public, produces a special or particular injury to an individual, such individual may bring a private bill in his own name, and while nominally acting for him-

¹ Wetmore v. Law, 34 Barb. (N. Y.) J. 340; People v. Vanderbilt, 26 N. Y. 515.

² Harrison v. McCrary, 1 Ala. 619.

³ Ferrier v. Schrubber, 16 La. An. 7.

⁴ Goodson v. Richardson, 9 L. R. Ch. App. 225.

⁵ Higbee v. R. R. Co., 20 N. J. 435; Morris v. R. R. Co., id. 53.

⁶ Attorney-General v. Steward, 21 N. J. 340; Higbee v. R. R. Co., ante.

⁷ Attorney-General v. Steward, 21 N.

⁸ Attorney-General v. Richards, 2 Anst. 604; People v. Vanderbilt, ante; Attorney-General v. Forbes, 2 M. & C. 123; Attorney-General v. Johnson, 2 Wils. C. C. 87; Attorney-General v. Sheffield Gas Co., 3 D. M. & G. 3021; People v. Davidson, 30 Ca. 379; Attorney-General v. Granite Bridge Co., 2 Green (N. J.), 136.

self he is regarded as representing all others whose rights are affected thereby.¹ So any number of persons injuriously affected by the nuisance may join in a bill for an injunction.²

SEC. 812. In the case of private bills brought to restrain a public nuisance, it must clearly appear from the bill that the plaintiff will sustain a special and particular injury therefrom, and that the injury is irreparable as in the case of a purely private nuisance.³ There must be a clear necessity for the injunction in the light of inability to be compensated for the wrong.⁴ The right to the injunction must be clear, and the wrong likely to ensue, distinctly established.⁵ When the injunction is sought against large and expensive works or any lawful employment rather than against a *willful* encroachment upon rights, it should clearly appear from the bill and be established by the proof that the works or employment are a nuisance, and that a court of law can afford no adequate redress.⁶ In such a case, where nuisance and irreparable injury appear, the magnitude of the works to be affected by the injunction on the one hand, or the smallness of the damage on the other, will not prevent the issue of an injunction.⁷

SEC. 813. In the case of injunctions against public companies for nuisances committed by them in the construction of their works or the prosecution of their business, a clear case of nuisance and irreparable injury must be alleged and proved,⁸ and it must clearly appear that the act is not lawful in view of the power given by the legislature,⁹ either because in excess of its powers¹⁰ or because it is so carelessly or recklessly done as to be a nuisance.¹¹

¹ *Milhau v. Sharpe*, 27 N. Y. 625; *Hamilton v. Whitridge*, 11 Md. 128.

² *Peck v. Elder*, 3 Sandf. (N.Y.) 126.

³ *Hinchman v. Patterson Horse Railroad Co.*, 2 Green (N. J.), 75; *Mississippi Railroad Co. v. Ward*, 2 Black. (U. S.) 485; *Parrish v. Stephens*, 1 Or. 73.

⁴ *Burgess v. Kettleman*, 41 Mo. 48.

⁵ *Sparhawk v. Railroad Co.*, 54 Penn. St. 401.

⁶ *New Boston Coal, etc., Co. v. Pottsville Water Co.*, 54 Penn. St. 154.

⁷ *Clowes v. Potteries Co.*, 8 L. R. Ch. 125.

⁸ *Sparhawk v. Railroad Co.*, 54 Penn. St. 401.

⁹ *Lee v. Pembroke Iron Co.*, 57 Me. 481; *Stevens v. Middlesex Canal*, 12 Mass. 466; *Thacher v. Bridge Co.*, 18 Pick. (Mass.) 50.

¹⁰ *Sandford v. R. R. Co.*, 24 Penn. St. 378; *Hudson R. R. Co. v. Artcher*, 6 Paige's Ch. (N. Y.) 88.

¹¹ *Att'y-Gen'l v. Met. Board of Works* 1 H. & M. 320; *Stainton v. Woolrych*, 23 Beav. 225.

Thus in a case in Vermont,¹ a railroad company being bound to fence its road, planted willow trees on each side of their track adjoining the plaintiff's meadow, which was subject to inundation, with the intention of having them remain there and grow with the purpose of using them to attach boards to in making their fence. Upon a bill brought by the plaintiff alleging that the roots of the willows, as they grew, would extend into his soil and injure the land seriously, the court enjoined the company from maintaining the trees there, as not being warranted under its charter.

SEC. 814. As has previously been stated, where the question of nuisance has been determined at law, unless the party has deprived himself of equitable relief by his own *laches* or misconduct, the courts will grant an injunction to stay the nuisance as a matter of course, where the nuisance is *continuous* or of a *constantly recurring* character, and but few cases are to be found, either in this country or England, where such remedy has been denied. The reason, therefore, as well as the question of the remedy under such circumstances, is quite apparent. Every person who is injured by a nuisance has a right, of his own motion, and with a strong hand, to abate so much of the nuisance as produces the injury to him. Where the nuisance has been established, this right to abate, of his own motion, becomes full and complete; but after, its abatement by the party would be attended with extreme hazards. Particularly would this be the case where the nuisance arose from the *use* of a building with machinery therein, only a part of which contributed to the production of the nuisance. The abatement of the act of the party, is restricted to an abatement of only *so much of the nuisance* as is necessary to protect his rights and stop the injury to him.² For any excess of abatement beyond that, he becomes liable in damages. He judges and acts at his own peril.³ Now there certainly can be no equity or justice in a rule that would protect a wrong-doer, whose wrongful act has been made fully

¹ Brock v. Conn. & Pass. Railroad Co., 35 Vt. 373. 24 Mich. 508; City of McGregor v. Boyle, 34 Iowa, 268.

² Thompson v. Allen, 7 Lans. (N. Y.) ³ Hicks v. Dorn, 42 N. Y. 47; Indianapolis v. Miller, 27 Ind. 394.

manifest, and has been established in a court of law, in continuing his wrongful act, and leaving the person whose legal rights are invaded thereby powerless to prevent the wrong except of his own motion, and then at the peril of being mulcted in damages at the suit of a person who is a wrong-doer, by reason of some mistake or some excess of judgment or excess of abatement. Again, in many cases, the party would be left utterly powerless to prevent the wrong, even of his own motion, as the use of the property may be such as to be beyond the possibility of abatement by the party injured. Thus, where a building is used for the purpose of slaughtering cattle, the stench from which pollute the air, as the blood and offal from which is thrown into a running stream, polluting its waters, however severe the injury, the party injured would be powerless to prevent it. It is the *use* of the building that creates the nuisance, hence the building itself cannot be destroyed.¹ The party cannot drive away the cattle, to prevent their being killed there. There is no machinery whose destruction will prevent the nuisance. The party cannot with a strong hand forcibly prevent the slaughtering of cattle there, as he must commit no breach of the peace,¹ and thus, we should have the novel spectacle of a court of equity virtually protecting a wrong-doer in inflicting a legal wrong and injury upon an innocent party. No such action has ever been taken by a court of equity, where the party seeking redress was free from fault. Even though the damage is merely nominal, in fact though there may be no actual pecuniary damage, yet, if the right and its invasion are established, and the invasion is going on from day to day, or time to time, so that the party would be compelled to resort to repeated suits to protect his right, an injunction may be said to be almost a matter of positive right, to protect the rights of the party, and prevent the wrong, when the party is himself free from fault. It is said in some Pennsylvania cases² that an injunction is a matter of "grace," but this is a serious mistake. It is error for a chancellor to refuse an injunction in a proper case, and the appellate court will always grant it, when it has been improperly

¹ *Perry v. Fishowe*, 8 Ad. & El. (Q. B.) 904.

² *Rhodes v. Dunbar*, 57 Penn. St. 274; *Richards v. Phenix Co.*, id. 105.

refused in the lower court. It is a matter of "grace" in no sense, except that it rests in the sound discretion of the court, and if that discretion is improperly exercised, either in granting or refusing it, it is error, which an appellate tribunal will correct. In this country, we do not repose the power in courts to bestow *gracious* favors upon parties. Every man is equal before the law, and stands or falls upon his actual rights. We have no kingly privileges, but the door of the temple of justice stands open to all without reference to their rank or condition in life. Where a party goes on with the nuisance after a verdict at law, this fact of itself shows the inadequacy of a court of law to protect the right, and where the damages are nominal, such a result is more likely than in cases where substantial damages may be recovered. In a case of nuisance, the question is not necessarily one of motive or of damages, but of rights. If a legal right is invaded by any thing recognized as a nuisance, courts of equity always interfere, irrespective of the motive that actuates the plaintiff, or the damages resulting. Formerly it was the practice of the courts to require the parties to first settle their rights in a court of law, except in extreme cases; but now, a court of equity will settle the rights of the parties without the aid of a court of law, and, if adequate redress cannot be had in damages, the right will be protected by injunction. By adequate redress is meant damages of such an amount as fairly redress the injury and stop the wrong. If the damages recovered are large, this is usually the result, but if the damage is small, merely nominal, "*infinitesimal*" in the language of some of the cases, the legal remedy proves *inadequate*, and a court of equity will interpose its corrective or preventive power to protect the right.

CHAPTER TWENTY-SIXTH.

REMEDIES AT LAW.

SEC. 815. Classification of remedies.

816. Compensatory remedy.

817. Actions by landlords.

818. Actions by tenants.

819. Rule in *Smith v. Humbert*.

820. What the declaration should contain.

821. Where many contribute to nuisance any one may be charged.

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847. Indictments for obstruction of highways.

848. Disorderly houses.

849. Publication of obscene books, etc.

850. When indictment will lie against landlord.

851. Noxious trades near highways, etc.

852. When "*ad commune nocumentum*" should be used.

SEC. 815. The remedies for nuisances may be divided into three classes; preventive, compensatory and by punishment.

The preventive remedy is secured by two methods. By the intervention of a court of equity to prevent the erection or use of the thing complained of, and by the act of the party injured, by an abatement of the nuisance with a "strong hand," of his own motion. The compensatory remedy is by an action at law for a recovery of damages resulting from the nuisance, and the remedy by punishment is that sought on behalf of the public by indictment.

The remedy by way of prevention, so far as the powers of a court of equity are concerned, has been treated of in the preceding chapter, but the remedies, by compensation, indictment and by the act of the party injured, will be treated of in this chapter.

SEC. 816. The compensatory remedy for injuries resulting from a nuisance is by an action on the case, and may be brought in the name of any person injuriously affected thereby.¹ If the injury complained of is to the comfortable enjoyment of property, by smoke, noxious vapors, noisome smells, noise, or the interruption of any easement or right incident to the estate and affecting its present use or enjoyment, the tenant may maintain an action in his own name, and he need not allege or prove any title in himself to the property, beyond that of bare possession.² If the nuisance is not of a permanent character, or does not produce a permanent injury to the property, the owner of the fee, except in exceptional instances, which will be named hereafter, cannot maintain an action when the property or estate is in the possession of a tenant under a lease for a term, whether long or short.³

¹ 2 Saunders on Plead. 686; Reynolds v. Clark, Pittsburgh Rep. (Penn.) 9.

² Villers v. Ball, 1 Shower, 12; Graham v. Peat, 1 East, 244; Simpson v. Savage, 1 C. B. (N. S.) 347; Mumford v. Oxford, etc., Railroad Co., 1 H. & N. 85.

³ Simpson v. Savage, ante; Metropolitan Association v. Pitch, 9 C. B. (O. S.) 365; Jackson v. Pesked, 1 M. & S. 234; Brown v. Mullett, 5 C. B. (O. S.) 599. The rule seems to be that when the nuisance is of a permanent character or produces a permanent in-

jury to the estate, the reversioner may maintain an action therefor. By permanent injury is not meant necessarily actual injury and damage, but a legal injury, a permanent invasion of a right. This may result even when the nuisance is temporary. Grant v. Lyon, 4 Metc. (Mass.) 477; Atkins v. Boardman, 2 id. 469; Bolivar Manufacturing Co. v. Neponsett Manufacturing Co., 16 Pick. (Mass.) 247; Robert Mary's Case, 9 Coke, 118; Fay v. Prentice, 1 C. B. (N. S.) 828; Hopewood v. Schofield, 2 M. & Rob. 34.

SEC. 817. But if, in consequence of the nuisance, the landlord is prevented from renting his premises,¹ or if he is compelled to rent them at a less price than he could but for the existence of the nuisance,² or if the actual value of the property is thereby impaired, or if the nuisance is of such a character and the situation of the parties are such that, if the right is not asserted, a servitude will be imposed upon the estate, the landlord may bring an action for the injury to the estate.³

SEC. 818. In an action by a tenant or a person in possession of premises affected by a nuisance under title less than a freehold estate, it is only necessary to allege the fact that the plaintiff *is* in possession of the premises, describing them, and that the possession thereof is injured by the nuisance complained of, describing it particularly as to its effect upon the plaintiff's rights, and the facts set forth in the declaration must be such as show that the use of the defendant's property, in the manner charged, is in fact a nuisance and a violation of the plaintiff's rights.⁴ A tenant,

As in the case of erecting a building with eaves projecting over another's land. *Fay v. Prentice*, ante; *Codman v. Evans*, 7 Allen (Mass.), 43. Or a building hiding another's ancient lights (*Tomlinson v. Brown*, E. T. 1755, MSS.; *Tucker v. Newman*, 11 Ad. & El. 40), or any act which if long continued will impose a servitude upon the estate. *Metropolitan Association v. Pitch*, 9 C. B. (O. S.) 365; *Bonomi v. Backhouse*, E. B. & E. 640.

In such cases the tenant may sue for the injury to the possession, and the landlord for the injury to the estate. *Jesser v. Gifford*, 4 Burr. 2141; *Same v. Barwish*, Cro. Jac. 231.

¹ *Potter v. Froment*, 47 Cal. 165.

² *Ross v. Butler*, 19 N. J. 294; *Francis v. Schoellkopf*, 53 N. Y. 154.

³ *Tucker v. Newman*, 11 Ad. & El. 40. See note to *Mellor v. Spatman*, 1 Wm. Saunders, 612, last edition, for a full review of authorities.

⁴ *Booth v. Wilson*, 1 B. & A. 59; *Peter v. Kendall*, 6 B. & C. 708; 1 Chitty on Plead. 330; 2 Saunders on Plead. 687; Comyn's Dig. Plead. C. 39; *Coryton v. Litheybe*, 2 Saund. 118; *Blissett v. Hart*, Willes, 508; *Symonds v. Seabourne*, Cro. Car. 325.

But if a *title* be stated it must be proved as laid or it will be a ground for a nonsuit (1 Chitty's Plead. 385), or if the title stated appears to be insufficient, it will be ground for a demurrer. *Stott v. Stott*, 16 East, 350; 2 Ld. Rayd. 1228; *Crowther v. Oldfield*, 1 Salk. 365.

The defect in titles is not cured by verdict. *Harrison v. Fulstowe*, Cro. Jac. 185; *Crowther v. Oldfield*, ante. But if the injury is to a right not appurtenant to the premises and only vests in the plaintiff by license or special agreement, the right and the title thereto must be definitely and accurately stated, and a naked possession or an exercise of the right will not support the action. *Fentiman v. Smith*, 4 East, 108; *Tewksbury v. Ditson*, 6 id. 437.

When the reversioner sues, it is necessary to state generally that the premises were in possession of a tenant, at the time when the injury was committed, but an allegation that the tenant is still in possession, or that the plaintiff's title still continues, is immaterial and if alleged need not be proved. *Vowles v. Miller*, 3 Taunt. 137, but if the injury complained of is the loss of

however, can only sue for damages and cannot claim an abatement of the nuisance.¹ In all cases where an abatement of the nuisance is claimed in addition to damages, in those States where the courts are clothed with power to order an abatement, the action must be brought by the owner of the estate affected by the nuisance, and against the owner of the land upon which the nuisance exists, or against the erector and the owner of the estate where the nuisance is erected by one who does not own the estate.² The owner of premises upon which a nuisance exists, although erected by a tenant, is liable therefor, if, at the time when the premises were let, he knew the purposes to which they were to be devoted, and had reason to know that the use of the property in that way would be productive of injury to others as a nuisance.³ It is not necessary that he should have known positively that the particular use would be a nuisance, but, if there were

a tenant by reason of the nuisance, the fact should be so stated and proved or the action will fail. *Potter v. Froment*, 47 Cal. 165; *Francis v. Schoellkopf*, 53 N. Y. 152; *Ross v. Butler*, 19 N. J. 294; *Wesson v. Washburn Iron Co.*, 13 Allen (Mass.), 95. If the injury complained of results from a breach of some duty incident to the defendant's estate, as non-repair of fences, non-repair of private ways, etc., it is sufficient to state generally that the defendant was in possession of the estate, and that it was his duty to repair certain fences, etc., without stating particularly how the duty arose. 1 *Chitty's Plead.* 332; 2 *Ld. Rayd.* 1090; 6 *Mod.* 311. But if the duty is created by a special statute or by an ordinance of a city or other corporation, so much of the act must be set forth as to enable the court to say that a duty was imposed upon the defendant thereby; but if it arises under a general law, the law need not be set up.

It is not necessary to state the precise day when the injury occurred. *Westbourne v. Mordaunt*, Cro. Eliz. 191, but if a former recovery has been had, the injury must be shown and alleged to have occurred subsequent to such former recovery. *Clowes v. North Staffordshire Potteries Co.*, 8 L. R. Ch. App. 125.

The action is local and should be brought in the county where the nui-

sance exists. The nuisance should be described with certainty, but a local description need not be given, and in the absence thereof, it will be sufficient if it is proved on the trial to have been committed in the county in which the action is brought. In local actions it is presumed that the injury occurred within the county where the action is brought, but good pleading requires that the locality should be definitely stated. *Warren v. Webb*, 1 Taunt. 379. But where the allegation is that the nuisance exists in one county and the proof is that it is in another, the variance is fatal. *Simmons v. Lillystone*, 8 Ex. 441.

¹ *Brown v. Woodworth*, 5 Barb. (N. Y.) 550; *Evans v. Evans*, 2 Camp. 191; *Barker v. Barker*, 3 C. & P. 557; *Cook v. Transportation Co.*, 1 Den. (N. Y.) 91; *Symons v. Seabourne*, Cro. Car. 325. But *contra*, see *De Laney v. Blizard*, 14 N. Y. Sup. Ct. 7, where it was held that one having a leasehold interest may maintain an action to abate a nuisance to the estate.

² *Ellsworth v. Putnam*, 16 Barb. 566; *Brown v. Woodworth*, 5 Barb. (N. Y.) 550; *Hutchins v. Smith*, 63 Id. 252. In New York the action under the Code may be both for damages and abatement, but the remedy is not encouraged. *Hutchins v. Smith*, ante; *Howard v. See*, 3 Sandf. (N. Y.) 232.

³ *Fish v. Dodge*, Denio (N. Y.), 311; *Morris v. Brower*, Anth. N. P. (N. Y.) 368; *Pickard v. Collins*, 23 Barb. (N. Y.) 444; *Blunt v. Aiken*, 15 Wend. (N. Y.) 522.

reasonable grounds to apprehend such a result, it is sufficient to charge him with liability, either alone, or jointly with the tenant, by one who is injured thereby.¹ But if premises are leased to a tenant, and the tenant creates a nuisance thereon, that was not contemplated by the lease, and which cannot fairly be said to have been licensed by the landlord, the tenant alone is liable for damages.² But if, after the nuisance is erected, the landlord renews the lease, this is such a ratification or adoption of the nuisance, as charges the landlord with liability.³

SEC. 819. In *Smith v. Humbert*, 2 Kerr (N. B.), 602, the defendant was the owner of premises adjoining the plaintiff's land. He had erected buildings thereon, and a privy for the use of the buildings, and let the premises to tenants. The privy by faulty use became a nuisance, and was so offensive that the plaintiff was prevented from renting his premises for as large rent as he otherwise would have been able to have rented them for. The court held that, where the landlord erects any thing upon his premises, which by improper use *may* become a nuisance, he is liable for all the consequences if the thing *in fact* becomes a nuisance through the fault of his tenants; and this is the case, even though the tenant has covenanted to make all repairs.⁴

SEC. 820. The action is local and should be laid in the county where the nuisance exists, but if no county is named the action will be upheld by proof that the nuisance exists in the county

¹ *Fish v. Dodge*, ante, ; *Marshall v. Cohen*, 44 Ga. 488; 9 Am. Rep. 170.

² *Burgess v. Gray*, 1 C. B. 591; *Ellis v. Sheffield Gas Co.*, 25 L. J. (Q. B.) 42.

³ *State v. Williams*, 1 Vroom. (N. J.) 112.

⁴ *Portland v. Richardson*, 54 Me. 46.

In *Rex v. Pedley*, 1 Ad. & El. 822, it was held that the landlord who lets premises with a nuisance thereon, or any thing liable to become so, except care is exercised (in this case a privy), is liable to indictment if the thing becomes a nuisance, even though the tenant has covenanted to repair. *Congreve v. Morgan*, 18 N. Y. 84; *Daven-*

port v. Ruckman, 10 Bosw. (N. Y.) 20; *Irvine v. Fowler*, 5 Robt. (N. Y.) 482; 51 N. Y. 224; *Rex v. Moore*, 3 B. & Ad. 184.

In *Gandy and wife v. Jubber*, 17 B. & S. 485, the owner of a messuage and premises, attached to which was an area, let the same to a tenant from year to year, and died; having devised the property, with an iron grating over the area improperly constructed and out of repair so as to amount to a nuisance to the defendant. The defendant, having no notice of the nuisance, suffered the tenant to remain in the occupation of the premises, upon the same terms as before receiving rent. The wife of A. hav

where the action is brought,¹ but if the nuisance is laid in one county and proved to be in another the variance is fatal.² The particular use of property complained of as a nuisance, as well as the injury resulting therefrom, should be particularly stated. The injurious act should be described according to the fact, but the particular manner in which the nuisance is created need not be stated.³ It seems, however, that if the mode of producing the injury is set forth it must be proved as laid,⁴ and a nuisance essentially different from that alleged cannot be proved.⁵ The rules of good pleading require that a nuisance should be described and set forth particularly and explicitly, as proof is not admissible to prove a nuisance of an essentially different character from that set up in the declaration.⁶ The declaration must also show that the defendant maintains or upholds the nuisance, and that it is caused by his own acts, or the acts of others by his knowledge or consent in some way, so that he may be said to be connected therewith. Although a nuisance exists upon a person's premises, yet if it exists there by the act of a stranger,⁷ or if it is caused by others outside his premises, no liability exists against him therefor. As, if filthy water is thrown upon premises above his, and, passing on his, accumulates there and emits noxious smells, no action lies against the owner of the lower estate therefor;⁸ nor, if by the erection of a mill noxious smells are emitted, can the owner of the dam be made liable if the nuisance arises from the acts of others, as by improved or increased cultivation of upper premises, or by ditching done by upper owner whereby silt accumulates and chokes the channel, producing an overflow and the collection of water in stagnant pools.⁹ So, too, no liability exists for a nuisance that is created by natural causes, and to which the act of

ing sustained damage by reason of the dangerous condition of the grating; held by the court of queen's bench, that the defendant, as reversioner, was liable to an action for the damage thereby occasioned by the exchequer chamber. *Marshall v. Cohen*, 44 Ga. 489; 9 Am. Rep. 170.

But see *Fisher v. Thirkell*, 21 Mich. 1; *Bears v. Ambler*, 9 Penn. St. 193; *City of Lowell v. Spaulding*, 4 Cush. (Mass.) 277; *Elliott v. Aiken*, 45 N. H. 36; *Owings v. Jones*, 9 Md. 108; *Estes v. Estes*, 23 Ind. 114

¹ *Warren v. Webb*, 1 Taunt. 379; *State v. Sturdevant*, 8 Shep. (Md.) 9; *Oliphant v. Smith*, 3 Penn. 180.

² *Simmons v. Lillystone*, 8 Ex. 441.

³ *Ellis v. Rowles*, Willes, 677.

⁴ *Anonymous*, 1 Ld. Raym. 452.

⁵ *O'Brien v. St. Paul R. R. Co.*, 18 Minn. 176.

⁶ *O'Brien v. St. Paul*, 18 Minn. 176.

⁷ *Saxby v. Manchester*, Sheffield & Lincolnshire R. R. Co., 19 L. T. (N. S.) 640.

⁸ *State v. Burlington*, 36 Vt. 521.

⁹ *State v. Rankin*, 3 S. C. 438.

man has not contributed ;¹ nor for a nuisance that would exist independent of any act done by the defendant, and where his act has not essentially increased it.²

But, if the act of the defendant contributes essentially to the creation of the nuisance, as by the erection of a dam which renders the water stagnant,³ or produces its overflow so as to cause it to gather in pools or eddies and become stagnant,⁴ or by raising it so as to cause the decay of vegetable matter upon its banks, whereby unwholesome gases are developed,⁵ he is liable, even though natural causes combine with his act to produce the injury.

SEC. 821. So, too, any person who contributes to the production of a nuisance may be made chargeable therewith, although many others contributed thereto, and his act alone would not constitute a nuisance, but the combined effect of which is to create an actionable injury ; as, if several persons drain their premises into the same ditch, the waters from which are discharged near the premises of another, and produce an injury either to his estate or to its comfortable enjoyment, any of the persons so using the drain are liable, either jointly or separately, for the damages, or to indictment therefor.⁶ Or if several persons use a private way in a manner different from what they have a lawful right to use it, although there is no concert between them in its use, and each uses it on his own account and at different times, although the unlawful use by either one of the parties would not constitute an actionable obstruction ; yet if the use, by all of them combined, creates a nuisance to others, an action may be maintained against one or all of the parties whose acts contribute to the nuisance.⁷

SEC. 822. It is not necessary to set up the defendant's title to the property upon which the nuisance exists, but his relation to the nuisance must be set forth in such a way as to show that he

¹ *Mohr v. Gault*, 10 Wis. 313.

² *Beach v. People*, 11 Mich. 106.

³ *Rogers v. Barker*, 31 Barb. (N. Y.) 447.

⁴ *Beach v. People*, 11 Mich. 103.

⁵ *People v. Townsend*, 3 Hill (N. Y.), 479.

⁶ *Duke of Buccleugh v. Coman*, 5 Macph. 214 ; *McAuley v. Roberts*, 13 Grant's Cas. (U. C.) 565 ; *Crossley v. Lightowler*, 2 L. R. Ch. 486.

⁷ *Thorpe v. Brumfitt*, 8 L. R. Ch. App. 654.

is legally liable for its existence.¹ Any person contributing to a nuisance is liable therefor, either jointly with others or alone.² It is not necessary that he should actually have aided in the creation or the maintenance of it;³ it is sufficient if he stands in a position to it that responsibility therefor can be legally predicated against him.⁴ As, if the nuisance arose from the acts of his servants in the course of their employment,⁵ or of his tenants in the use of the premises for the purposes for which they were demised when he knew, or had reason to believe, that their use in that way would produce the results complained of;⁶ or if the nuisance was created by a contractor, when the nuisance was necessarily created in the prosecution of the work which he undertook to perform;⁷ but, otherwise, if the work might be done without causing a nuisance, and the nuisance only resulted from the carelessness of the contractor.⁸ So, if the nuisance was erected before he became the owner of the property, if he uses it, having knowledge of its injurious results,⁹ or after notice thereof, and request to remove it;¹⁰ and it seems that knowledge of the fact that injurious results ensue to one estate is not sufficient to charge him with knowledge that injurious results ensue to another, even though the other be an adjoining estate.¹¹ But such facts must be established as show knowledge on his part of the particular nuisance complained of, or notice thereof must be given before the action is brought.¹² A servant, or any person aiding in the creation or maintenance of a nuisance, is jointly liable with his master therefor, or may be sued alone.¹³ But in the declaration the capacity in which the defendant was acting should not be alleged; as, in actions for a tort, all who are engaged therein are principals, and equally liable therefor, in whatever capacity they were acting.¹⁴

¹ *Cheetham v. Hampson*, 4 T. R. 318; *Rider v. Smith*, 3 id. 767.

² *Chenango Br. Co. v. Lewis*, 63 Barb. (N. Y.) 111.

³ *Rex v. Medley*, 6 C. & P. 292.

⁴ *Regina v. Stephens*, 1 L. R. (Q. B.) 701.

⁵ *Reg v. Stephens*, ante.

⁶ *Fish v. Dodge*, 4 Den. (N. Y.) 411; *Cobb v. Smith*, 38 Wis. 21.

⁷ *Chicago v. Robbins*, 2 Black (U. S.)

⁸ *Butler v. Hunter*, 7 H. & N. 826.

⁹ *Brown v. Cayuga R. R. Co.*, 12 N. Y. 487.

¹⁰ *Johnson v. Lewis*, 13 Conn. 303; *Pinney v. Berry*, 61 Mo. 359.

¹¹ *Cohocton Stone Co. v. R. R. Co.*, 51 N. Y. 573.

¹² *Cohocton Stone Co. v. R. R. Co.*, ante.

¹³ *Losee v. Buchanan*, 51 N. Y. 476; *Regina v. Stephens*, 1 L. R. Q. B. 701; *Rex v. Medley*, 6 C. & P. 292.

¹⁴ *Sutton v. Clarke*, 6 Taunt. 29; *Mitchell v. Tarbutt*, 5 T. R. 651; *Chenango B. Co. v. Lewis*, 63 Barb. (N. Y.) 111.

SEC. 823. A recovery in one action does not prevent a recovery in another for all damages resulting between the bringing of the former suit, and the second or third, or whatever number of actions may be brought,¹ for, in judgment of law, every continuance of a nuisance, is a new nuisance for which an action may be brought.² Neither does the abatement of a nuisance by the plaintiff of his own motion, or by the defendant himself, prevent a recovery for all damages sustained prior to the abatement.³

SEC. 824. If the nuisance complained of is created by a corporation, the corporation and such of its officers as have the direction and control of its business, as well as its agents or servants who contributed to the nuisance, may be jointly sued or indicted therefor.⁴

SEC. 825. In all actions for a nuisance, enough should be stated to show that the act complained of, if proved as laid, is in fact and in law a nuisance. This, of course, not only involves the necessity of setting forth the nature of the wrong, but also its injurious results. By this, I do not mean that it is necessary to state the precise manner in which the nuisance is created, as that would generally be impossible, and usually very dangerous; as, if a party, in setting up a nuisance, undertakes to state the *particular means* used to produce it, he must prove the allegation as laid, and failing in that, the variance will be fatal.⁵ But the nuisance *as it exists* should be specifically set forth, as well as the injurious results produced thereby,⁶ and the injury set forth must be such as imposes upon the defendant a legal obligation to respond to the plaintiff in damages, for otherwise the declaration will be insufficient on demurrer.⁷

Thus a tenant must not declare for an injury to the estate that does not affect his possessory right, nor the landlord or reversioner for an injury simply to the possession. There must be an

¹ *Clowes v. N. Staffordshire Potteries Co.*, 8 L. R. Ch.

² *Cohocton Stone Co. v. R. R. Co.*, 52 Barb. (N. Y.) 390; *Beckwith v. Griswold*, 29 id. 291.

³ *Crump v. Lambert*, 17 L. T. (N. S.) *Pierce v. Dart*, 7 Cowen (N. Y.), 607; *Tate v. Parrish*, 7 Monr. (Ky.) 325; *Call v. Buttrick*, 4 Cush. (Mass.) 345.

⁴ *Rex v. Medley*, 6 C. & P. 439; *Regina v. Stephens*, 1 L. R. (Q. B.) 701.

⁵ *Anonymous*, 1 Ld. Raym. 452; 2 *Saunders on Pleading*, 688; *O'Brien v. R. R. Co.*, 18 Minn. 176.

⁶ *Ellis v. Rowles*, Willes, 677.

⁷ *Pickard v. Collins*, 23 Barb. (N. Y.) 444.

immediate right of action on the one hand, and an immediate liability on the other. It is not necessary that *actual* damage should be alleged, but it must clearly appear that a legal right has been invaded, and in such a case the law will imply the requisite damage to uphold the right.¹ But where nuisance consists in the *special* damage produced, the special injury should be particularly stated. As, in an action by an occupant for an injury to the enjoyment of the premises, by the exercise of a noxious trade by the defendant, the injury should be definitely stated. If the injury consists in a pollution of the air by smoke, noxious vapors, or noisome smells, it should be stated that the extent of the pollution is such as to impair the reasonable, ordinary comfort of the premises; and if there are any special ill results beyond that, as the impregnation of the atmosphere with cinders, soot, ashes or dust, these should also be set forth; and if the result is, that the cinders, soot, ashes or dust enter the premises and settle upon and injure the furniture or other property, this special injury should also be stated. A failure to prove all the allegations of special damage will not prevent a recovery; it is simply necessary to prove enough to sustain the allegation of nuisance and show a legal injury from the defendant's acts.² The allegation of present and past injury and damage must be made; as, if it appear that the defendant has only done an act from which injury and damage *may* result, no nuisance at law exists, and the action must fail. Thus, if the defendant has erected a dam upon a stream which will flood the plaintiff's land in time of high water, but which has not yet produced that result; or if he has excavated upon his own lands in such a manner that the plaintiff's lands will ultimately be let down, but which have not yet been injured, no action lies until the damage *actually transpires*. There must be present or past injury to uphold the action.³

¹ *Ashby v. White*, 2 Ld. Raym. 928; 253; *Bemis v. Upham*, 13 Pick. (Mass.) 169; *Ripka v. Sargent*, 7 W. & S. (Penn.) 9; *Ballou v. Inhabitants*, 4 Gray (Mass.), 324.
² *Barnard v. Duthy*, 5 Taunton, 27; *Bonomi v. Backhouse*, 9 H. L. Cas. 503.
³ *Bonomi v. Backhouse*, ante; *Ludlow v. R. R. Co.*, 6 Lans. (N. Y. S. C.) 128; *Shaw v. Thackerah*, 1 L. R. (C. P.) 564; *Webb v. Bird*, 13 C. B. (N. S.) 843; *Chasemore v. Richards*, 7 H. & N. 849.
Webb v. Portland Manufacturing Co., 3 Sum. (U. S.) 189; *Parker v. Griswold*, 17 Conn. 288; *Wood v. Wand*, 3 Exchq. 748; *Goodson v. Richardson*, 9 L. R. Ch. App. 221; *Wilts v. Navigation Co.*, 1 id. 456; *Reid v. Gifford*, 1 Hopk. (N. Y.) 416; *White v. Forbes*, Walk. (Mich.) 112; *Bolivar Manufacturing Co. v. Neponset Co.*, 16 Pick. (Mass.) 212; *Arthur v. Case*, 1 Paige (N. Y.), 448; *Blanchard v. Baker*, 8 Greenl. (Me.)

SEC. 826. Tenants in common may join in an action for a nuisance affecting their estate,¹ but persons having distinct interests affected by the same nuisance must bring separate actions.²

So, while all persons upholding a particular nuisance may be joined as defendants in an action for damages therefrom, yet they must be parties to one and the same nuisance. Thus, if A and B maintain a smith's forge, the smoke from which, added to the smoke already produced in that locality by a smith's forge carried on by C, creates an actionable nuisance, A, B and C cannot be joined as defendants in an action by D, who is injuriously affected thereby. Actions must be brought against A and B respecting their nuisance, and also against C respecting the nuisance produced by him. There is no such connection between their acts as make them liable jointly for the ill results ensuing from them. Each is liable for the nuisance produced by him, and if the act of C, before A and B erected their forge, produced no nuisance, then A and B have no right to maintain their forge, if, added to the smoke and noise and dust from C's shop, a nuisance results; and the fact that the dust and noise and smoke from C's shop is necessary to create the nuisance, is no defense for them.³

SEC. 827. If a person parts with his interest in premises upon which a nuisance exists at the time of sale, he continues liable for all damage created thereby as well after as before the sale.⁴ But it would seem that this is not the case when the premises have been conveyed by quit-claim deed. Such is the rule in New York,⁵ and would seem to be within the principle of all the cases. The fact that the defendant cannot enter to abate the nuisance,

¹ Bacon's Abr., Joint Tenants.

² Saunders' Pleadings, 686; Great Falls Co. v. Worster, 15 N. H. 412.

³ Thorpe v. Brumfitt, 8 L. R., Ch. 656, where JAMES, L. J., says: "Suppose one person leaves a wheelbarrow standing in a way, that may cause no appreciable inconvenience, but if a hundred do so, that may cause a serious inconvenience, which a person entitled to the use of the way has a right to prevent; and it is no defense

to any one among the hundred to say that what he does, of itself, causes no damage to the complainant." Slight v. Gutzlaß, 35 Wis. 675.

4. Dorman v. Ames, 12 Minn. 451; Cohocton Stone Co. v. Buffalo R. R. Co., 52 Barb. (N. Y.) 390; Curtis v. Thompson, 19 N. H. 47; Plumer v. Harper, 31d. 88; Eastman v. Amoskeag Co., 44 Id. 143; Jordan v. Helwig, 1 Wilson (Ind.), 447.

5. Waggoner v. Jermaine, 3 Denio (N. Y.), 306; Hanse v. Cowing, 1 Lans. (N. Y.) 288.

does not excuse his liability, for it is his own wrong which has involved him in trouble.¹

SEC. 828. The owner of premises, who has demised them with a nuisance thereon, is regarded as upholding a nuisance by receiving rent therefor; so when he has conveyed the premises, with covenants of warranty, he is regarded as upholding the nuisance by his covenants;² but when the conveyance is by *quitclaim* deed, he simply conveys his right, title and interest in the property, and is not regarded as conveying any right in or to the premises which he did not legally possess, or which he could not legally exercise.³

SEC. 829. In all actions for injuries sustained from a public nuisance, the declaration must contain a specific statement of the *special* damage, or the declaration will be insufficient on demurrer, and the defect will not be cured by verdict.⁴ The *special* injury is the *gist* of the action, and unless alleged and proved, no cause of action exists.⁵ The damage must be such as is particular and peculiar to the plaintiff, and different from that sustained by the rest of the public.⁶

SEC. 830. Thus, in the case of an injury from the erection of a building in a highway, a declaration simply alleging that the defendant had erected a building in a highway whereby the defendant was prevented from passing with his horses and carriage, or on foot, would be insufficient, for all the public are equally prevented from passing, and no recovery can be had for the common injury;⁷ but, if by reason of the obstruction, the plaintiff is prevented from reaching his premises,⁸ or if access

¹ Smith v. Elliott, 9 Penn. St. 345; Thompson v. Gibson, 7 M. & W. 456; Com. v.

² Irvine v. Wood, 51 N. Y. 224.

³ Blunt v. Aiken, 15 Wend. (N. Y.) 522; Waggoner v. Jermaine, 3 Denio (N. Y.), 306; Staple v. Spring, 10 Mass. 72.

⁴ O'Brien v. St. Paul, 18 Minn. 176; Venand v. Cross, 8 Kan. 248; Clark v. Peckham, 9 R. I. 455; Grigsby v. Clear Lake Co., 40 Cal. 193; Smith v. McConathy, 11 Mo. 515.

⁵ Sampson v. Smith, 8 Sim. 272; White v. Cohen, 19 Eng. Law & Eq. 146; Francis v. Schoellkopf, 53 N. Y. 152; Wesson v. Washburne Iron Co., 13 Allen (Mass.), 94.

⁶ Higbee v. Camden & Amboy R. R. Co., 19 N. J. 278; Houck v. Waucher, 34 Md. 265; 6 Am. Rep. 332.

⁷ Hopkins v. Crombie, 24 N. H. 176.

⁸ Brown v. Watrous, 47 Me. 161; Pierce v. Dart, 7 Cow. (N. Y.) 605.

thereto is cut off or made difficult,¹ or if customers are prevented from coming to his shop to trade,² or to his inn for refreshments;³ or if he is compelled to take a more circuitous route to reach his destination, and thereby sustains material damage, as by the loss of time, or being subjected to loss in the sale of his goods, or in being prevented from performing a contract, or discharging a legal duty, the special injury should be specifically and clearly set forth in the declaration, and must, in the main, be established by proof on the trial, or no recovery can be had. In an action arising from a public nuisance, the *gravamen* of the action is the *special* damage;⁴ but, in the case of a private nuisance purely, the fact of the nuisance appearing, all damages, that are the natural and probable consequence thereof, to a particular right, can be recovered, whether specially alleged in the declaration or not.⁵

SEC. 831. There are a class of actions for nuisances in which negligence must be alleged. As, for injuries arising from the undermining of buildings, by excavations upon adjoining lands;⁶ for injuries resulting from the explosion of steam boilers,⁷ of gunpowder,⁸ although in the latter case it seems that the keeping of large quantities in a populous locality, or near the dwellings of another, or near a highway, is a nuisance *per se*, rendering the owner thereof liable for all injuries resulting therefrom.⁹ So in actions against persons acting under legislative powers, unless the act is in excess of their powers, negligence should be alleged; as for injuries resulting from the flooding of lands, by the erection of an embankment, for want of a proper culvert under the same,¹⁰ or turning surface-water upon the premises of another,¹⁰ or preventing the drainage of lands when, by ditches and sluices,

¹ Stetson v. Faxon, 19 Mass. 147; 220; Panton v. Holland, 17 Johns. (N. Y.) 92; Moody v. McClelland, 39 Ala. 45.
 Corning v. Lowerre, 6 Johns. Ch. (N.Y.) 641; Savannah R. R. Co. v. Shiels, 33 Ga. 601.

² Iveson v. Moore, 12 Mod. 263.

³ Francis v. Schoellkopf, 53 N. Y. 152.

⁴ Carter v. Taume, 103 Mass. 507; Vandervlice v. Newton, 4 N. Y. 130.

⁵ La Sala v. Holbrook, 4 Paige (N. Y.), 169; Thurston v. Hancock, 12 Mass.

⁶ Losee v. Buchanan, 51 N. Y. 476.

⁷ People v. Sands, 1 Johns. (N. Y.) 78.

⁸ Weir v. Kirk, 74 Penn. St. 274.

⁹ Johnson v. Atlantic, etc., R. R. Co. 35 N. H. 567.

¹⁰ Waterman v. Conn. & Pass. R. R. Co., 30 Vt. 610.

the injury could have been prevented;¹ but, except where the act is strictly within the scope of the grant, and the natural or probable consequence thereof, negligence is not an element, and need not be alleged.² As, if there are two modes of doing an act, one of which would not result injuriously, if the method is chosen that *does* produce injury, liability attaches for all the consequences.³ But, as persons acting under legislative authority are given large discretion in the mode of doing their work, except in cases where the method chosen is clearly improper, too much reliance should not be predicated on this claim.⁴ Generally, however, negligence is not an element in an action for a nuisance.⁵

SEC. 832. Dangerous animals, accustomed to bite or attack mankind, are regarded as nuisances; but in order to fix liability upon the owner or keeper, it must be shown that he *knew* of their propensities;⁶ therefore it is always necessary to allege a *scienter* in the declaration, and to prove it on the trial,⁷ but this is only the case in reference to domestic animals. If the animal is of a *ferocious* nature, as a tiger, bear, or other animal *ferae naturae*, knowledge of its propensities need not be alleged or proved.⁸ If the injury results while the plaintiff is upon the premises of the defendant, the declaration should show that he was *lawfully* there;⁹ but if it occurs while in a highway, or outside the defendant's premises, the fact of the animal being at large is sufficient evidence of negligent keeping.¹⁰

¹ Lawrence v. Great Northern R. R. Co., 4 Eng. Law & Eq. 265; 16 Q. B. 642.

² Lawrence v. Gt. Northern R. R. Co., ante.

³ R. R. Co. v. Canal Co., 1 Pa. Ca. 225; Matthews v. West London Waterworks Co., 3 Camp. 402; King v. Morris & Essex R. R. Co., 18 N. J. 377; Cleveland v. Grand Trunk R. R. Co., 42 Vt. 449.

⁴ Whitcomb v. Vt. Central R. R. Co., 25 Vt. 69; Regina v. Scott, 3 Ad. & El. 543.

⁵ Hay v. Cohoes Co., 1 N. Y. 167;

Fletcher v. Ryland, 1 L. R. Ex. 262; 3 H. L. Cas. 330; Wilson v. New Bedford, 108 Mass. 261; 11 Am Rep. 352; Cahill v. Eastman, 18 Minn. 324; 10 Am. Rep. 184.

⁶ Spaulding v. Oakes, 42 Vt. 343.

⁷ Parton v. Haggarty, 35 Ind. 178; Kelly v. Tilton, 2 Abb. (N. Y. Ct. App.) 495.

⁸ Lawrence v. Mangianti, 44 Cal. 138.

⁹ Loomis v. Terry, 7 Wend. (N. Y.) 486.

¹⁰ May v. Burdett, 9 Ad. & El. (Q. B.) 101.

SEC. 833. Except in those States where special provision is made therefor by statute, no power exists in a court of law to direct the abatement of a nuisance, after a verdict establishing it, either in an action for damages or under an indictment. The old common-law remedies, involving an abatement, have become obsolete and passed into disuse. Provision is made in many of the States for an abatement upon order of court after verdict, but it would be outside the scope of this work to give the practice under these various statutes. It is easy for the practitioner in any State to ascertain the scope of these special remedies, which have no interest to the profession generally. It is proper to say, however, that courts hesitate to apply these statutory remedies, and do not generally encourage them; and parties in a proper case will find far more easy redress for their grievances from nuisances in a court of equity than in a court of law. Courts of law will always exercise their discretion in these matters, and, so far as my researches have extended in that direction, I have found that it is only in extreme cases that they will order the prostration or removal of a nuisance. They prefer to leave the parties to their redress before a tribunal of larger powers and more effective remedies, where all the right and equities of the parties can be fully investigated. And this course is not one of doubtful wisdom, and has rapidly grown in favor within the last half century.

SEC. 834. Any person injured by a nuisance, to the extent that he may maintain an action at law therefor, may remove so much of the nuisance as is necessary to secure to himself immunity from damage therefrom,¹ but he must not be guilty of any excess therein, for, as to all excess of abatement, he will be a trespasser.²

¹ *Baten's Case*, 9 Coke, 55; *Norrice v. Baker*, 3 Bulst. 198; *Earl of Lonsdale v. Nelson*, 2 B. & C. 311; *Amoskeag Co. v. Goodale*, N. H. 56; *Rhea v. Forsyth*, 37 Penn. St. 503; *State v. Parrot*, 7 N. C. 311; *Perry v. Fitzhowe*, 8 Ad. & El. (Q. B.) 757; *Adams v. Barney*, 25 Vt. 225; *Roberts v. Rose*; *Pendruddock's Case*, 5 Coke, 101, n. a and b; *Smick v. Thorp*, 13 Grattan (Va.), 564.

² *Gates v. Blancoe*, 2 Dana (Ky.), 158;

Hutchinson v. Grainger, 13 Vt. 394; *Dyer v. Depui*, 5 Whart. (Penn.) 584; *Jewell v. Gardner*, 12 Mass. 311; *Heath v. Williams*, 25 Me. 209; *Wright v. Moore*, 38 Ala. 599; *Maffit v. Bruner*, 1 Greene (Iowa), 348; *Perry v. Fitzhowe*, 8 Ad. & El. (Q. B.) 757. But see *Indianapolis v. Miller*, 27 Ind. 894, where it is held that he would only be liable for wanton and unnecessary injury.

SEC. 835. In order to warrant the exercise of this extraordinary power, the thing must be in itself a nuisance,¹ or it must, at the time it is abated, be injuring him.² A thing cannot be abated before it actually becomes a nuisance.³ Thus, in *Norrice v. Baker*, 1 Rolle, 394, COKE, C. J., says: "If a person have an intent to build a wall, and lay the foundation, you cannot pull this down." And CROKE, J., in the same case, says: "So, although boughs which hang over another's land may be cut, yet they cannot be cut *lest they shall hereafter grow over*." And, as still further illustrative of the principle, ROLLE, in his *Abridgment*, title *Nuisance A*, says: "A man cannot remove scaffolds, etc., for making a building which will be a nuisance when finished." Thus it will be seen that nothing can be abated upon the mere apprehension of damage or nuisance; but, at the very time when the thing is abated, it must be a nuisance, and operating injuriously to the person abating it, or have previously so operated, and be of such a nature that it will, in the very nature of things, produce similar results again.⁴

SEC. 836. If a dam be erected upon a stream, that pens back the water and floods the lands of an upper owner, he may lawfully enter upon the premises of the owner and abate so much of the dam as produces the injury to his land.⁵ So, too, if a house be erected so that the eaves overhang the lands or buildings of another, the person whose estate is thus injured may saw off the portion of the building so overhanging his lands.⁶ So, too, if a house be erected so as to hide the ancient lights of another, the person whose estate is injured may remove so much of the house as is necessary to restore the full exercise of his right. So, too, if a house be so erected as to shoot rain and snow from the roof thereof, over upon the land or buildings of another, the person so injured may enter upon the land of the person owning the building, and remove so much of it as is necessary to prevent the

¹ As a house whose eaves overhang the land of another. *Baten's Case*, 9 Coke, 55; *Pendruddock's Case*, 5 id. 101.

² *Gates v. Blancoe*, 8 Dana (Ky.), 158.

³ Rolle's Abr., Nuisance, A; *Norrice v. Baker*, 1 Rolle's Rep. 395.

⁴ *Adams v. Barney*, 25 Vt. 231; *Roberts v. Rose*, 1 L. R. (4), 82.

⁵ *Pendruddock's Case*, 5 Coke, 101; *Baten's Case*, 9 id. 55.

injury.¹ So, too, if a noxious trade be set up in the vicinity of another's dwelling, he may enter the premises and destroy so much of the machinery as is necessary to prevent the nuisance,² but, when the nuisance arises from the improper *use* of a building, the building itself cannot be destroyed but only the improper use thereof stopped.³ So, too, if a bridge be erected across a navigable stream, without proper draws, a person navigating the stream, may, if prevented from passing, remove so much of the bridge as prevents his passage with his boat.⁴ So, if a house *unoccupied* be left in such a filthy condition as to endanger the health of the neighborhood, or, if it be in such a dilapidated condition as to endanger the safety of adjoining houses, or, if by reason of the use of it by tramps and idle persons it becomes a pest to the owners of adjoining property, any person who is injured thereby may tear down the house.⁵

But if a house is occupied, even though it has itself become a nuisance, it cannot be abated.⁶ The reason is that an abatement cannot, under such circumstances, be made without involving a breach of the peace, and a nuisance can never be abated with a strong hand, except under very extraordinary circumstances, unless it can be done peaceably and without riot.⁷

SEC. 837. The question as to when animals may be killed, when, by reason of their diseased state, or by reason of their ferocious disposition, they have become nuisances, and dangerous to the safety of other animals, is one of considerable importance. The rule seems to be that so long as the owner restrains the animals upon his own premises, no person has a right to kill or injure them; but if they are suffered to go at large, or if they escape from the owner's custody, in the case of animals affected with a contagious disease, the owner of the premises upon which they escape may kill them if necessary for the protection of his own animals. In the case of *Franz v. Hitterbrand*, 45 Mo. 121,

¹ *Rex v. Pappineau*, 2 Strange, 688; *Cooper v. Marshall*, 1 Burr. 259; *Rex v. Rosewell*, 2 Salk. 459; *Dyer v. Depui*, 5 Whart. (Penn.) 584.

² *Manhattan Co. v. Van Keuren*, 23 N. J. 141.

³ *Brown v. Perkins*, 12 Gray (Mass.), 95.

⁴ *State v. Parrott*, 71 N. C. 311.

⁵ *Harvey v. Dewoody*, 18 Ark. 252.

⁶ *Perry v. Fishowe*, 8 Ad. & El. (N. S.) 757; *Davies v. Williams*, 16 id. 546.

⁷ *Rex v. Rosewell*, 2 Salk. 459.

the plaintiff was the owner of two horses, sick with a contagious disease, which he kept upon his own premises. The defendants, for the purpose of preventing the spread of the disease, and with no malicious purpose, entered upon plaintiff's premises and killed the horses, claiming that they had the right to do so, as the horses had become a nuisance injurious to them. The court held that their act was not justifiable, and that the plaintiff was entitled to recover the actual value of the horses.

In *Williams v. Dixon*, 65 N. C. 416, the plaintiff was the owner of an ass which he knew to be in the habit of attacking and injuring stock. He suffered the ass to run at large and it attacked the defendant's cow, threw her down, and was proceeding to stamp on her when the owner of the cow killed the ass. It was held that he was justified in the killing.

But when an animal is simply found trespassing upon another's premises, the owner of the premises will not be justified in injuring the animal.¹

SEC. 838. Enough has been said to illustrate the general doctrine of abatement by the act of the party injured. But it is proper to say that this remedy is a dangerous one, and one which should never be resorted to except in extreme cases, when the exigencies of the case will not brook delay. The law generally affords ample redress for all injuries, and, if no verdict declaring the thing to be a nuisance can be obtained, no justification for its removal can be upheld. The party judges at his peril, and if he errs in judgment he is answerable for all the damages that ensue, and if, in the exercise of the right, a breach of the peace is involved, he is answerable by indictment for the result. Therefore, generally, it is unsafe to advise a party to remove a nuisance himself, at least if the nuisance is not beyond doubt, and the removal confined within the limits of actual right.

SEC. 839. In an action on the case the plea of not guilty puts in issue all the averments of the declaration, and whatever will, in equity and good conscience, according to the existing circumstances, preclude the plaintiff from recovering, may be given in

¹ *Bost v. Mingues*, 64 N. C. 44; *Ladue v. Branch*, 42 Vt. 574.

evidence by the defendant, because the plaintiff must recover upon the justice and conscience of his case.¹ Thus in *Bird v. Randal*, 3 Bur. 1353, Lord MANSFIELD laid down the distinction between an action on the case and other tortious actions thus: "Another essential difference," said he, "between these cases upon torts and actions on the case is, that those (other cases) are *stricti juris*, and therefore such a former recovery, release or satisfaction cannot be given in evidence, but must be *pleaded*. But an action upon the case is founded upon the mere justice and conscience of the plaintiff's case, *and is in the nature of a bill in equity, and in effect is so*, and, therefore, a former recovery, release or satisfaction need not be pleaded, but may be given in evidence under the general issue, for whatever will, in equity and conscience, according to the circumstances of the case, bar the plaintiff's recovery, may in this action (of the case) be given in evidence by the defendant; *because the plaintiff must recover upon the justice and conscience of his case, and upon that only.*" Thus, it will be seen that special matter, as a license, need not be specially pleaded. But if the statute of limitations is relied upon it must be specially pleaded,² and any special matter may be pleaded, although it is not necessary.

SEC. 840. Any special matter, however, that goes in bar or avoidance of the action must be established by the defendants, and the burden is upon him of establishing it by the same class and degree of evidence as would be required if it had been specially pleaded. Thus, a person claiming a prescriptive right to maintain the nuisance, and inflict the injury, must clearly establish the right by proof of continuous, open, peaceable and adverse user to the extent claimed for the full statutory period, and the right must be shown broad enough to cover the subject-matter of the action, or the defense fails.¹ So, too, when a person sets up a license to do the acts charged in the declaration, the license must be clearly established, and it must also be made clearly to appear that the injury complained of is fairly within the contemplation of the party giving it.² When the injury is the natural

¹ 1 Chitty on Pleadings, 432.

² 1 Saunders on Pleadings, 348; 2

² 1 Saunders Pleadings and Ev. 345. id. 689.

and necessary result of the acts to be done under the license, it will be a full defense, but, if they are not a necessary result, liability cannot be avoided under it. The same is the case when the party claims protection under a legislative grant.¹

SEC. 841. The plaintiff is required to prove all the material allegations of his complaint. The burden of proof is upon him and he must establish the right, the injury thereto, and the damage.² He must also show that the defendant committed the injury, or, what is tantamount thereto, that it was committed by his servants, agents, tenants or other person under such circumstances that he can be held legally chargeable for the consequences of the act.³ He must also prove that he had a *legal* interest in the subject-matter affected by the nuisance, and a person having a mere equitable interest cannot maintain an action unless actually in possession of the premises at the time when the injury happened.⁴ If an action is brought by a tenant he must prove an injury to his possessory right, and if he only proves an injury to the estate, that does not affect his possessory interest, the action must fail. If the action is brought by a reversioner he must prove an injury to the estate *that affects his reversionary interests*, or he must show that some right incident thereto is injured, which, if not protected by judgment, will affect the estate.⁴ If the premises are in the possession of a tenant for a term, and the tenant leaves in consequence of the nuisance, this fact should be alleged in the declaration, proved upon the trial, and the recovery will be limited to the loss of rent.⁵

SEC. 842. The fact that the defendant was acting as the agent or servant of another is no defense, and in a civil action is not admissible in evidence.⁶ Neither is the fact that others contributed to the nuisance in an equal or greater degree with the defendant,⁷ nor that the trade is lawful,⁸ useful,⁹ or for the public

¹ Truman v. Headley, 33 N. J. 523.

² Dawes v. Peck, 8 T. R. 330; Oldaker v. Hunt, 19 Beav. 485.

³ Jones v. Jones, 7 T. R. 47.

⁴ Cotterill v. Hobly, 4 B. & C. 465.

⁵ Cotterill v. Hobly, 4 B. & C. 465.

⁶ Reg. v. Stephens, 1 L. R. (Q. B.)

700; Rex v. Medley, 6 Cr. P. 439

⁷ Ricker v. Freeman, 50 N. H. 420.

⁸ Ryland v. Fletcher, 1 L. R. Ex. 263.

⁹ Poynton v. Gill, 2 Rolle's Abr. 140; Beardmore v. Treadwell, 31 L. T. (N. S.) 873.

benefit, or that it really benefits the defendant's property,¹ the question is simply whether a legal right has been invaded by the defendant in whatever capacity acting; if so, there can be no defense except the right to do the act, acquired by grant, prescription, or by license,² and there can be no evidence in mitigation, except when more than actual damages are claimed.³

SEC. 843. The plaintiff must prove his right, but if the injury is merely to a possessory right, possession alone need be proved,⁴ but if it is an actual injury to the estate, title to the estate in the plaintiff must be established.⁵ If the injury be to an easement, title thereto must be established, either by grant or prescription.⁶ If the injury be to a special franchise, as a ferry, possession of the franchise at the time when the injury happened is sufficient.⁷ The defendant may, however, attack the right, and in that event the plaintiff must prove his title thereto.⁸

SEC. 844. Indictments for nuisances must particularly describe the nuisance for the maintenance of which a conviction is sought, and it must appear to be in the county in which the indictment is found. Thus, in an indictment for maintaining a wharf in a navigable river, it is not sufficient to charge the wharf to be one "known as the Weeks' wharf," but the river and the location of the wharf, and the particular respects in which it operates as a nuisance, must be stated with certainty.⁹ In an indictment for the maintenance of a mill-dam which renders the water stagnant or produces noxious or unwholesome swells, the stream and the location of the dam must be particularly described, as well as the nature of the injury that constitutes the nuisance.

SEC. 845. The nuisance and its location must be described with certainty; thus in an indictment for maintaining a mill-dam across

¹ *Francis v. Schoellkopf*, 53 N. Y. 152.

² *Selwyn's N. P.* 1112.

³ *Tremain v. Cohoes Co.*, 1 N. Y. 167.

⁴ *Anonymous*, 1 Vent. 264; *Winford v. Wallaston*, 3 Lev. 266; *Coryton v. Litheybe*, 2 Saund. 114; *Tenant v. Goldwin*, 1 Salk. 360; *Reg. v. Bucknell*, 2 Ld. Raym. 804. Possession alone is title, and he who has such title can

hold as against every one but him who has a title superior to it. *Fisher v. Philadelphia*, 75 Penn. St. 392.

⁵ *Cotterill v. Hobly*, 4 B. & C. 465.

⁶ *Selwyn's Nisi Prius*, 1112.

⁷ *Peter v. Kendall*, 6 B. & C. 703.

⁸ 2 Wm. Saunders, note c, p. 114.

⁹ *State v. Sturdevant*, 8 Shepley (Me.) 9.

a navigable stream, the indictment charged the respondent with maintaining a mill-dam across a certain stream of water called the Elkhart river. The indictment was held bad for not stating the location of the dam with sufficient certainty.¹ So, too, an indictment for a nuisance in maintaining a mill-dam, the property of the defendant, near to a certain highway, was held bad for not sufficiently describing the location of the dam.² But in an indictment for not repairing a highway, it is sufficient to describe it as a highway in a certain town leading by the premises of certain individuals with such certainty that no mistake can arise as to what highway is intended, even though the termini of the road are not given.³ But it should always be borne in mind that the nuisance must be described fully, so that if the facts averred are true, a legal nuisance is shown to exist, and the location should be definitely given.

And, if the injury arises from the raising of the water and the washing of animal or vegetable matter, or both, upon the banks, which, by the action of the sun upon it, produces the ill results, this will sustain the indictment, even though the stream is not navigable; or if the injury arises from the rising and falling of the water, or from the action of the sun upon the vegetable substances growing upon the margin, if the ill results would not ensue except for the effect of the dam upon the water, a conviction can be had.⁴ In an indictment for maintaining a bridge across a navigable stream which has been erected by authority of the legislature, but which is a nuisance by reason of its not being built according to the authority given, or because it unreasonably obstructs navigation, or because it is provided with defective draws, the particular ground upon which it is claimed to be a nuisance must be definitely and particularly stated.⁵

SEC. 846. An indictment against one for maintaining a mill-dam upon a stream, so as to overflow a highway, will lie, even although the injury is only occasional, and twenty years' user will be no defense; but the location of the dam and the character of the injury must be specifically and definitely set forth

¹ Wood v. The State, 5 Ind. 599.

² Stephens' Case, 2 Leigh (Va.), 759.

³ Com. v. Newbury, 2 Pick. (Mass.)

⁴ People v. Townsend, 3 Hill (N. Y.), 479.

⁵ State v. Freeport, 43 Me. 198; State v. Dibble, 4 Jones' Law (N. C.), 107.

in the indictment.¹ In an indictment for keeping a stud horse and letting it to mares on a public street, and in view of its inhabitants, it is not necessary to allege that the owner or keeper had provided no inclosure in which the stallion was let to mares. It is sufficient to allege that the offense was committed in view of the people living upon or passing along the street.²

SEC. 847. So, too, in an indictment for an obstruction of a public street or highway, the street or highway should be definitely described, as well as the nature and extent of the obstruction.³ If the indictment is for shutting up an old highway, the location of the road, and the manner in which it is closed, must be specifically stated and with certainty.⁴ If, by placing a gate across it,⁵ or a fence,⁶ or a building in it,⁷ or by whatever means, the character of the obstruction should be clearly and fully stated, as no obstruction of an essentially different character from the one stated can be proved upon the trial.⁸

SEC. 848. An indictment against one for keeping a "disorderly house" without stating in what respect it is so, charges no offense known to the law, and a conviction under such an indictment could not be sustained.⁹ So, too, charging one with keeping a "disorderly house," without stating that it is in a "public place," is equally fatal. The indictment should state fully and particularly in what respect the house is a disorderly house, and, unless the facts set forth are such as in law constitute it so, the indictment will be bad.¹⁰

SEC. 849. In an indictment for publishing an obscene book, it is sufficient to aver its obscenity generally, and the whole of the book need not be spread upon the records. It is sufficient to set

¹ *State v. Phipps*, 4 Ind. 505.

² *Crane v. State*, 3 Ind. 193.

³ *State v. Sturdevant*, 8 Shep. (Me.) 9; *People v. Cunningham*, 1 Denio (N. Y.), 524.

⁴ *Allen v. Lyon*, 2 Root (Conn.), 213.

⁵ *Wales v. Stetson*, 2 Mass. 143.

⁶ *Boyer v. State*, Ind. 451; *Hopkins v. Crombie*, 4 N. H. 520; *Pierce v. Dart*, 1 Cow. (N. Y.) 609.

⁷ *State v. Atkinson*, 28 Vt. 147.

⁸ *O'Brien v. St. Paul*, 18 Minn. 176; *Com. v. Donovan*, 82 Mass. 18; *Com. v. Rumford Chemical Works*, 82 id. 231.

⁹ *Withers v. Ficus*, 40 Ind. 131; 13 Am. Rep. 283.

¹⁰ *Commonwealth v. Wise*, 110 Mass 181.

forth enough to show the bad character of the punocation.¹ The special manner of the offense should be set forth with such certainty that the offense may judicially appear to the court.² In an indictment against one for exposing his person indecently, it should be stated that he "exposed his person to public view in a public place," without averring that it was in the presence of any person;³ but an indictment simply charging the defendant with erecting a number of sheds upon a public highway, without setting forth that they were an obstruction to public travel, is held to be insufficient;⁴ but the correctness of this may well be doubted, as a mere encroachment upon a highway is now held to be a public nuisance, and, when the fact of encroachment is proved, the nuisance is established.⁵ So, too, any encroachment upon a tidal stream that in *any*, even the slightest, degree impedes navigation, is a public nuisance. Thus, in *Regina v. Ryan*, 8 Ir. L. R. (Q. B.) 112, it was held that the erection of weirs in a tidal river is a nuisance to navigation, and indictable. In *Regina v. Hayes*, 7 Ir. L. R. (Q. B.) 2, it was held that the finding of a jury that an obstruction of a navigable stream is trifling, amounted to a verdict of guilty, and that it is no defense to show that, while the weirs are some hindrance to smaller vessels, they are beneficial to larger ones by pointing out the channel.⁶

SEC. 850. An indictment will lie against a landlord who lets a house knowing that it is to be used for the purposes of prostitution, and he may be indicted either for the letting of the house for that purpose⁷ or as keeper.⁸ But if he is indicted for the letting, the indictment should contain a *scienter*. An incorporated company may be indicted for a nuisance, and its officers and servants who contributed thereto may be joined in the indictment. Thus, in *Rex v. Medley*, 6 C. & P. 439, an indictment was held to lie against a gas company, its directors, superintendent and engineer, for polluting the waters of a public river by discharging into it the refuse from its gas works, although the direct-

¹ *Com. v. Holmes*, 17 Mass. 336.

⁵ *State v. Atkinson*, 28 Vt.

² *State v. Wimberly*, 4 McCord (S. C.), 190.

⁶ See chapter on navigable streams, ante.

³ *State v. Roper*, 1 Dev. & Bat. (N. C.) 119.

⁷ *Com. v. Harrington*, 3 Pick. (Mass.) 26.

⁴ *Com. v. Hall*, 15 Mass. 240.

⁸ *People v. Erwin*, 4 Den. (N. Y.) 121.

ors were personally ignorant of the particular plan adopted, and although the plan was in fact contrary to their orders, and a similar indictment was upheld in *Regina v. Stephens*.¹

SEC. 851. An indictment for carrying on a noxious trade, as a slaughter-house, a bone boiling establishment or any other noxious trade, it is sufficient to set forth that the works are carried on near a public highway, or in a public place, and that the smells and odors emitted therefrom are stinking and offensive and detrimental to the comfort of the public. It is not necessary to allege that they are injurious to health,² and the fact that the trade has been carried on in that locality for thirty or even a hundred years will be no defense thereto. There can be no excuse or prescription for a public nuisance.³

SEC. 852. All indictments for a nuisance should state that the nuisance is "*ad commune nocumentum*," and not contrary to the form of the statute, etc., unless the nuisance is made so by statute, in which case it must be charged to be contrary to the statute, etc., unless the indictment is framed for the common-law offense.

CHAPTER TWENTY-SEVENTH.

DAMAGES.

SEC. 853. When actual damage only can be recovered.

854. When diminution of value of vacant lots may be recovered.

855. When more than actual damages should be given.

856. When entire damage may be recovered.

857. Recovery where two parties are interested for a part of the time.

858. Rule as to damages.

¹ *Regina v. Stephens*, 1 L. R. (Q. B.) 701.

² *Ashbrook v. Com.* 1 Bush (Ky.), 139; *Catlin v. Valentine*, 9 Paige (N. Y.) 575; *Rex v. Cross*, C. & P. ; *Rex v. White*, 5 Bur. 333.

³ *Weld v. Hornby*, 7 East, 684; *Ashbrook v. Com.*, 1 Bush (Ky.), 139; *Cross*

v. Morristown, 18 N. Y. 305; *Mills v. Hall*, 9 Wend. (N. Y.) 315; *Com. v. Elberger*, 1 Whart. (Penn.) 469; *Com. v. Upton*, 6 Gray (Mass.), 476; *People v. Cunningham*, 1 Denio (N. Y.), 536; *Regina v. Brewster*, 8 U. C. (C. P.) 236; *Regina v. McMeikan*, 6 W.W. & A. B. L. (Vic.) 68.

SEC. 859. Rule in case of excavations.

860. Rule in actions by reversioner.

861. Rule in certain cases when plaintiff is not using his premises.

862. When actual compensation is the limit of recovery.

863. When prospective profits may be recovered.

864. Actual benefit to the plaintiff no defense.

865. Injuries to possessory rights.

866. Motion of defendant generally of no account.

867. *Damnum absque injuria*.

SEC. 853. In an action for a nuisance, the recovery is limited to the *actual* damage sustained.¹ In cases where the injury is of a visible, tangible character, the damage may at times be susceptible of exact measurement; but, in a majority of instances, the subject of damages will rest largely in the discretion of the jury.² In the case of an action for an injury to the comfortable enjoyment of property, by a person in possession, no precise rule for ascertaining the damage can be given, as, in the very nature of things, the subject-matter affected is not susceptible of exact measurement; therefore, the jury are left to say what, in their judgment, the plaintiff ought to have in money, and what the defendant ought to pay, in view of the discomfort or annoyance to which the plaintiff and his family have been subjected by the nuisance; and whether the verdict is large or small, if, in view of the evidence, it has any reasonable foundation, it will not be disturbed because it is too small on the one hand, or too large on the other.³ But, in the case of an action by the reversioner, for an injury to the estate, the damages are usually the subject of easy computation. Thus, if the injury complained of is the loss of a tenant, the actual rental value of the premises during the period that the premises have remained unoccupied is the limit of recovery.⁴ Or, if the injury is to the value of the premises themselves, the difference in the value of the premises before the nuisance existed, and their value with the nuisance there, is the measure of damage.⁵

¹ *Thayer v. Brooks*, 10 Ohio, 161; *Luther v. Winnisimmet Co.*, 9 Cush. (Mass.) 171.

² *Frank v. R. R. Co.*, 20 La. An. 25. In *Pike v. Doyle*, 19 La. An. 362, the rule is usually given thus: "In quasi offenses, the law has left a discretion to the court and jury in fixing the damages."

³ *Pierce v. Dart*, 8 Cow. (N. Y.) 605; *O'Mara v. R. R. Co.*, 38 N. Y. 455; *Pike v. Doyle*, La. An. 362.

⁴ *Francis v. Schoellkopf*, 53 N. Y. 152; *Wesson v. Washburn Iron Co.*, 13 Allen (Mass.), 95.

⁵ *Peck v. Elder*, 3 Sand. (N. Y.) 126; *Dana v. Valentine*, 5 Met. (Mass.) 105.

In *Seeley v. Alden*, 61 Penn. St. 312, it was held, in the case of an injury to a water-power by filling the water with tan-bark, that, in ascertaining the measure of damages, evidence was admissible as to the value of the land with and without the nuisance. In *Selma R. R. Co. v. Knapp*, 42 Ala. 480, it was held, when the rental value of the property had been diminished, that, for the purpose of establishing that fact, it was not competent to show that the rental value of other property had been diminished by the same nuisance.

SEC. 854. It has been held that when lands have been laid out into building lots, even though no buildings are erected thereon, the owner may recover for their depreciation in value by the erection of a nuisance in their vicinity; that is, he may maintain an action for the difference in their market value;¹ but the fact that the premises have been *increased* in value by reason of the nuisance, will not prevent the recovery of damages to support the plaintiff's right.²

SEC. 855. In the first instance in an action for a nuisance, the recovery is limited to the actual damage sustained;³ but if the nuisance is continued after a verdict at law establishing the nuisance, exemplary damages not only may but shall be given, and that to such an extent as to secure an abatement of the wrong.⁴ The fact that the person maintaining the nuisance continues its exercise after his right to do so has been denied by a verdict of a jury, is regarded as a wanton and willful invasion of another's right, which clearly entitles the party injured to exemplary damages.⁵ In *Morford v. Woodworth*, 7 Ind. 83, an action was brought against the defendant for a nuisance committed by his servants. The plaintiff claimed a recovery in excess of actual damages by way of punishment, and the court refused the claim upon the ground that the defendant personally was not at fault.

1. *Peck v. Elder*, 1 Sandf. (N. Y.) 126; *Dana v. Valentine*, 5 Mass. 8. But in California it was held that in an action to recover for special damages arising from obstructing a street in front of the plaintiff's premises, evidence that the value of the premises was thereby diminished was inadmissible. *Hopkins v. Western Pac. R. R. Co.*, 50 Cal. 190.

2. *Francis v. Schoellkopf*, 78 N. Y. 152;

Wesson v. Washburn Iron Co., 13 Allen (Mass.), 95.

3. *Harsh v. Butler*, 1 Wright (Penn.), 99; *Thayer v. Brooks*, 10 Ohio, 161; *McKnight v. Ratcliffe*, 44 Penn. St. 156; *Hatch v. Dwight*, 17 Mass. 289; *Shaw v. Cumisky*, 7 Pick. (Mass.) 76.

4. *Bradley v. Ames*, 2 Hay. (N. C.) 399.

5. *New Orleans, etc., R. R. Co. v. Stut-*
ham, 42 Miss. 607.

It is only in instances when the injury is inflicted from wanton or malicious motives, *or a reckless disregard of the rights of others*, or when the act results in great hardship and oppression, that punitive damages are given;¹ and these elements exist when, after the legal right is determined, a party goes on with a nuisance injurious to others, and he cannot, by making changes in the method of his use of the property, screen himself from liability for exemplary damages.²

SEC. 856. Where the damages are of a permanent character, and go to the entire value of the estate affected by the nuisance, a recovery may be had of the entire damages in one action.³ Thus, in an action for overflowing the plaintiff's land by a mill-dam, the lands being submerged thereby to such an extent, and for such a period, as to make it useless to the plaintiff for any purpose, the jury were instructed to find a verdict for the plaintiff for the full value of the land.⁴ So, too, when a railroad company by permanent erections imposed a continuous burden upon the plaintiff's estate, which deprived the plaintiff of any beneficial use of the portion of the estate so used by it, it was held that the whole damage might be recovered at once;⁵ but where the extent of a wrong may be apportioned from time to time, and does not go to the entire destruction of the estate, or its beneficial use, separate actions not only may, but *must* be brought to recover the damages sustained.⁶

SEC. 857. Where, in an action for a nuisance, it appears that, for a part of the period covered by the declaration, another person was jointly in the occupancy of the premises with the plaintiff, this does not prevent a recovery by him for damages during the entire period;⁷ and where the damages are continuous in their nature, the party injured is entitled to recover for all

¹ Nagle v. Morrison, 34 Penn. St. 48; Dorsey v. Manlove, 14 Cal. 553; Hodgson v. Medward, 3 Grant (Penn.), 406; Borst v. Allen, 30 Ill. 30.

² Soltan v. DeHeld, 9 Eng. Law & Eq. 104.

³ Troy v. Cheshire R. R. Co., 23 N. H. 101; Cheshire Turnpike Co. v.

Stevens, 13 id. 28; Parks v. City of Boston, 15 Pick. (Mass.) 198.

⁴ Anonymous, 4 Dallas (U. S.), 147.

⁵ Troy v. R. R. Co., ante.

⁶ Plumer v. Harper, 3 N. H. 88; Cheshire Turnpike Co. v. Stevens, ante.

⁷ Branch v. Doane, 17 Conn. 402.

damages done previous to the bringing of the action.¹ It is not necessary to prove *actual* damage; if there is an invasion of a right, which might have an effect upon the right of the plaintiff, if not asserted, nominal damages will be given where no actual damage is proved.² The rule is, that in all cases where a right is invaded, even though the damage is so small as not to be susceptible of estimation — *infinitesimal* as it is called — the court will give nominal damages in recognition and support of the right.³

SEC. 858. All damages that are the *natural* and *necessary* consequence of a nuisance may be recovered under a general allegation of damage; but damages that, although the natural, are not a *necessary* consequence, must be specially alleged, or no recovery can be had therefor. The rule may, perhaps, be stated thus: General damages are such as are the *necessary* consequence of an act, but damages that are the natural, although not the necessary consequence of an act, are special, and must be specially averred.⁴ Thus, in an action by a reversioner against one who shut off the access to a store owned by the plaintiff and leased to a tenant, by piling up lime, sand and other materials near the entrance thereto, so that the lime and sand were blown into the store and damaged the tenant's goods, and the access to the store being cut off so that his trade was destroyed, and he left the store, the plaintiff having failed to allege, in his declaration, the loss of a tenant as a consequence of the nuisance, it was held that no recovery could be had.⁵

SEC. 859. In an action for injuries to the freehold by excavations made near thereto, whereby a subsidence of the plaintiff's lands is caused, the measure of damages is not what it would cost to replace the lot in its former condition, but the actual diminution in its value by reason of the defendant's acts.⁶

¹ Puckell v. Smith, 5 Strobb. (S. C.) 26, but, ordinarily, damages are only recoverable up to the time of the bringing of the action. Shaw v. Eteridge, 3 Jones (N. C.), 300.

² Paul v. Slason, 22 Vt. 231; Pas-torius v. Fisher, 1 Rawle (Penn.), 127.

³ Cory v. Silcox, 6 Ind. 39.

⁴ Vanderslice v. Newton, 4 N. Y. 130
Griggs v. Fleckenstein, 18 Minn. 92.

⁵ Furlong v. Polleys, 30 Me. 491.

⁶ Mc Guire v. Grant, 1 Dutch. (N. J.) 356; Harney v. Sides, etc., Co., 1 Nev. 539.

For injuries to a person's house and grounds by reason of water diverted from its course by another, the measure of damages is the actual diminution in the value of the premises resulting from the wrongful diversion.¹ In the case of an injury to a water-course supplying a mill with motive power, by reason of obstructions placed therein, the owner of the mill may recover for all the damages sustained by him by reason of being deprived of water, not only by the obstruction, but also during its temporary necessary diversion for the removal of the obstruction.² In an action to abate a nuisance, and for damages caused by digging a ditch on the plaintiff's lands, it was held that an order to abate the nuisance, and an award of damages sufficient to pay for filling the ditch, was erroneous, as the plaintiff could not recover prospective damages, and the award should only have been for the actual injury sustained.³ The reason for this is obvious; the ditch was the nuisance and the abatement, involved its filling by the defendant, and it was not proper for the court to punish the defendant by compelling him to fill the ditch, and pay the expense thereof to the plaintiff in addition. In an action to recover damages for a nuisance which temporarily injures the realty, and for a time prevents its use by the plaintiff, it was held that the measure of damages was the actual cost of restoring the buildings to their former condition, and the damage sustained by reason of being deprived of their use during the continuance of the nuisance.⁴

SEC. 860. In an action by a reversioner for an injury done to his premises the true measure of damage is the actual injury to the reversion.⁵ Thus, in an action by a reversioner for cutting off the eaves of a building belonging to him and erecting a wall with a drip over his premises, it was held that the actual injury up to the time of the bringing of the action was the true measure of damage, and that, as repeated actions might be brought, evidence of the diminution of the market value of the estate could

¹ Chase v. N. Y. C. R. R. Co., 24 Barb. (N. Y.) 273.

² Dayton v. Pease, 4 Ohio (N. S.), 80.

³ De Costa v. Massachusetts, etc., Co., 17 Cal. 613.

⁴ Freeland v. Muscatine, 9 Iowa, 461.

⁵ Dutro v. Wilson, 4 Ohio St. 101.

not be given.¹ In *Hamer v. Knowles*,² what seems to be the true rule, as to the measure of damages for an injury to the realty by a nuisance, is given. In that case the plaintiff was the owner of a manufactory upon the surface of mining lands. The defendants, in the prosecution of their mining, caused a subsidence of the surface to such an extent as to break some of the plaintiff's machinery, and materially to impair the producing power of his mill, and also greatly increasing the expense of keeping the machinery in repair and largely diminishing the profits of his business. It was held that he was entitled to recover damages for the deterioration of his manufactory, for the machinery broken, the increase in the expense of keeping the same in repair, and for the diminution in the profits of his business.

In *Ludlow v. Yonkers*, 43 Barb. (N. Y.) 493, which was an action against a municipal corporation for the construction of a wall in such a negligent manner that it fell and injured the plaintiff's mill, it was held that the mill owner was only entitled to recover the actual injury sustained by him, with interest from the time of the injury, and that if rent was recoverable, it could only be recovered for such a period as was reasonably necessary to repair the premises.

In *Kane v. Johnston*, 9 Bosw. (N. Y.) 154, the court held that, where a person's tenement and business were injured by a nuisance, a loss of anticipated profits from an *illegal* business cannot be recovered. But in this case no question was made but that such a recovery might be had where the business was legal, and such as was not opposed to public morals and public policy. In *Sewal's Falls Bridge Co. v. Fisk*, Foster (N. H.), 171, which was an action for the destruction of the plaintiff's bridge by the defendant, it was held that the measure of damages was the value of the superstructure, and the loss of tolls during the time reasonably necessary to rebuild the bridge. The rule seems to be that, where the estate injured is actually devoted to a use that yields a profit to the owner, he is not only entitled to recover for the actual injury to the estate, but also such sum as compensates him for a loss of such profits during such period as is actually necessary

¹ *Bathishill v. Read*, 37 Eng. Law & Eq. 317.

² *Hamer v. Knowles*, 6 H. & N. 454.

to restore the property to its former condition. He cannot, however, sit down with folded arms and charge the defendant with loss during the period of his own inactivity. If a wrong has been done him, he is nevertheless bound to proper diligence himself to repair it, and during the period reasonably necessary for that purpose, the law will give him full indemnity; but beyond that the loss is his own.

SEC. 861. Neither can a person, who is not at the time when the injury is inflicted using his premises for any profitable purpose, recover damages for an injury which might have been suffered had the property been devoted to a use never contemplated by him. Damages are given as compensation for a loss actually suffered, and are intended to be measured by such a sum as the plaintiff ought to have, and the defendant ought to give, in view of all the circumstances, for the injury inflicted. But, in the absence of bad motives, of wantonness or malice, no more than actual compensation will be given.¹ Thus, in an action of trespass for cutting growing trees, although the actual value of the trees at the time of cutting may have been no more than for fire-wood, yet the recovery will not be restricted to their value for that purpose, but a recovery may be had for the actual injury to the land by their cutting; and in determining that question all the circumstances, as well as the purpose for which the trees were designed to be used, may be considered.²

SEC. 862. In an action for injuries arising from the unlawful raising of a dam below the plaintiff's cotton mill, on the same stream, the operation of which was greatly impeded by back water, whereby the plaintiff's profits were greatly diminished, evidence of the profits of the manufacture was held admissible, as a basis upon which to estimate the damages, if not as an actual measure thereof.³ In all cases of this character the true measure of damages is the actual compensation which, in view of all the circumstances, the plaintiff ought to have for the injury;⁴ but

¹ *Wooster v. Great Falls Manuf. Co.*,
41 Me. 159.

² *Chipman v. Hibbard*, 6 Cal. 162.

³ *Simmons v. Brown*, 5 R. I. 299.

⁴ *Taber v. Hutson*, 5 Ind. 322.

if there are several defendants, some of whom are more culpable than the rest, yet, if they are found to be jointly liable for the injury, the damages should not be graduated by the difference in culpability, but such damages should be given against all of them as the *most culpable* ought to pay.¹ So, too, where damages result from two concurring causes, the party in fault is not exempted from full liability because he did not occasion the whole of it;² if he contributed in any measure to the injury he may be charged with the whole injury, as much as though it had been occasioned by his individual act. There is no division of a wrong or contribution between wrong-doers.

SEC. 863. In an action for an injury sustained by a livery stable keeper, by reason of the communication of the horse distemper to two of his horses by a horse brought by the defendant to his stable to be kept, the defendant knowing the diseased condition of his horse, the court held that the plaintiff was entitled to recover the profits he would have derived from the services of his horses during the period of their illness, and that, while evidence of the profits he would probably have derived from them was not admissible definitely to fix the damage, yet, that it was admissible as one of the means by which the jury might arrive at the proper measure of compensation.³ In *Gillett v. Western Railroad Co.*, 8 Allen (Mass.), 560, in an action for injuries to a horse by reason of a defect in a highway, the plaintiff was held entitled to recover the diminution in the value of the horse at the commencement of the action, and in addition thereto, such sums as he had expended in its cure while under treatment, and a reasonable compensation for the loss of the use of the horse during the periods of its disability. Thus it will be seen that *compensation* for actual loss is the rule and measure of damages where there are no aggravating circumstances to increase them.

SEC. 864. In an action for a nuisance, actual benefits to the plaintiff's estate therefrom cannot be considered, either in defense

¹ *Bell v. Morrison*, 27 Mass. 68.

² *Ricker v. Freeman*, 50 N. H. 420.

³ *Fultz v. Aycoff*, 25 Ind. 321; *Haines*

v. Ashfield, 99 Mass. 540; *Albert v.*

Bleecker St., etc., R. R. Co., 2 Daly

(N. Y. C. P.), 389.

or in mitigation of damages.¹ Thus, in *Francis v. Schoellkopf*, 53 N. Y. 152, the defendant offered evidence to prove that the rental value of the plaintiff's premises had been largely increased by reason of the erection of his tannery, which had called large numbers of people to that locality, but the court held that this evidence was not admissible, and could have no bearing upon the case in any possible view.

SEC. 865. A lessee of lands may maintain an action for injuries to the possession by a nuisance, and may recover therefor such damages as he can show to his possessory right. Thus, in an action by the lessee of a livery stable against a person who laid gas pipes in the streets so imperfectly that the gas escaped therefrom through the ground and into the water of the well used by him in connection with the stable, rendering the water unfit for use, it was held that he might recover not only for the inconvenience to which he was thereby subjected, but also for expenses reasonably and properly incurred by him in attempts to exclude the gas from the well; but that he could not recover for injuries to his horses from drinking the water after he knew that it was so corrupted by the gas as to be unfit for that purpose.² So, too, a tenant at will of lands may recover for an injury to his possessory estate.³

SEC. 866. It is held that inert water lying upon the surface of an estate, as well as the water with which the estate is charged, so long as it remains inert, is the property of him who owns the soil; yet, as water percolates by natural causes, and in obedience to natural laws, if an adjoining owner sees fit to excavate upon his own land he may do so, although the result be, that the water in his neighbor's soil is completely exhausted.⁴ His wells or his springs may thereby be destroyed, but no action lies for the injury.⁵ So, too, one person may erect a solid wall around his estate and prevent the water therein from percolating through his

¹ *Vinnel v. Vinnel*, 4 Jones (N. C.), 121.

² *Sherman v. Fall River, etc., Co.*, 2 Allen (Mass.), 524.

³ *Foley v. Wyeth*, 2 id. 131.

⁴ *Frazier v. Brown*, 12 Ohio (U. S.), 294.

⁵ *Goodale v. Tuttle*, 29 N. Y. 466; *Mosier v. Caldwell*, 7 Nevada, 363; *Queen v. Metropolitan Board of Works* 3 B. & S. 710.

neighbor's soil, as it otherwise would do, although thereby a neighbor's well is made dry and his supply of water is completely cut off, and it seems that the *motive* with which the act is done has no effect upon the question of liability.¹

But this is only applicable to percolating or inert water; as to running streams, or water-courses upon the surface, the rule is different, and liability attaches for the sensible diversion of such water by trenches, wells or other means, even though the diversion results from percolation.²

SEC. 867. There are a multitude of uses to which one may devote his own property that operates injuriously to another for which no damages are recoverable. Indeed, it may be said, that a man is never liable for the results of the proper exercise of a lawful act; all the injuries resulting therefrom are *damnum absque injuria*. They are not the subject of damage, for the reason that no *right* has been violated by their exercise; and, therefore, in the eye of the law, the person injured should neither have, nor the defendant pay, any compensation therefor. Thus, where a person excavating his own lands injured a cistern under the street, it was held that no liability existed against him;³ so, too, where one in excavating upon his own land causes the walls of a building erected upon an adjoining lot to crack and the building itself to fall into his pit, he being in the exercise of due care, no damages are recoverable therefor.⁴ So, too, if a person owning lands adjoining the premises of another, upon which has been erected a palatial residence, erects upon his lands a cheap, unsightly building, which seriously annoys his neighbor, and impairs the value of his property, yet, so long as the building is not devoted to uses that make it a nuisance, no action lies therefor.⁵ The reason is, that every person may do what he will with his own, so long as he does not trench upon the positive rights of another. His acts may be unneighborly, they may be

¹ Chatfield v. Wilson, 28 Vt. 49; Harwood v. Benton, 32 id. 724; Frazier v. Brown, ante.

² Delhi v. Youmans, 45 N. Y. 363; Dickinson v. Canal Co., 7 Ex. 282; Pixley v. Clark, 32 Barb. (N. Y.) 268; Canal Co. v. Shayer, 6 L. R. Ch. App. 483.

³ Dubuque v. Maloney, 9 Iowa, 450.

⁴ McGuire v. Grant, 1 Dutch. (N. Y.) 356; Thurston v. Hancock, 12 Mass. 220; Foley v. Wyeth, 2 Allen (Mass.), 131; Shaw v. Thackerah, 1 L. R. (C. P.) 564.

⁵ Barnes v. Hathorn, 54 Me. 234.

prompted by the most malicious motives, and for malicious purposes, yet, so long as he keeps within the scope of his legal rights, no action, either at law or in equity, will lie against him therefor.¹ The test of nuisance is not injury and damage simply, *but injury and damage resulting from the violation of a legal right of another*. If there is no right violated there is no nuisance, however much of injury and damage may ensue,² but if a right is violated, there is an actionable nuisance, even though no *actual* damage results therefrom.³ While in the one case there is *actual* injury and damage, yet there is no *legal* injury, hence no right of action;⁴ while in the other, while there is no *actual* damage, yet there is *legal* injury, and consequently a right of action, the law imputing the damage to sustain the right.⁵ Therefore, in all cases of nuisance, before the bringing of an action, it should first be ascertained whether a legal right has been violated, if so, a nuisance exists, if not, no nuisance exists; and, however great the damage, it is *damnum absque injuria*."

¹ Ross v. Butler, 19 N. J. 294.

² Mahan v. Brown, 13 Wend. (N. Y.); Chatfield v. Wilson, 28 Vt. 49; Frazier v. Brown, 12 Ohio St. 294; Smith v. Bowen, 2 Dis. (Ohio) 153.

³ Fisher v. Clark, 41 Barb. (N. Y.) 327; Pickard v. Collins, 23 id. 444.

⁴ Quin v. More, 15 N. Y. 432; Kinsel v. Kinsel, 4 Jones (N. C.), 149.

⁵ Pickard v. Collins, 23 Barb. (N. Y.) 444; Thurston v. Hancock, 12 Mass. 220.

⁶ Ashby v. White, 1 Salk. 19; 2 Ld. Rayd. 928.

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